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Supreme Court of the United States

OCTOBER TERM, 1951

No. 86

HOWARD HUGHES, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 29, 1951.

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff

v.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Screen Gems, Inc.; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, Defendants

AMENDED AND SUPPLEMENTAL COMPLAINT—Filed November 14, 1940

Leave of Court having been first obtained, the United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, hereby amends and supplements the petition filed herein on July 20, 1938, and the bills of particulars filed pursuant thereto, by substituting therefor this amended and supplemental complaint against the following defendants:

[fol. 2] Paramount Pictures Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Cor-

poration; Screen Gems, Inc.; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; United Artists Corporation,—defendant corporations, and for its complaint plaintiff alleges, upon information and belief, as follows:

I. Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said Act being commonly known and hereafter referred to as the Sherman Act, against the above-named defendants in order to prevent violations by them, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to monopolize, and contracts, combinations and conspiracies to restrain [fol. 3] trade and commerce among the several states and territories of the United States have been and are conceived, carried out and made effective, in part, within the Southern District of New York, and many of the unlawful acts done in pursuance thereof have been performed by the defendants, or some of them, and their respective representatives, within said District. The interstate trade and commerce involved in the motion picture industry, as hereinafter described, is carried on, in part, within the said District.

II. Description of Defendants

3. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a cor-

poration organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either [fol. 4] directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

5. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33⅓% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation

[fol. 5] organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

6. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc. a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

7. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through sub-
[fol. 6] sidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation, approximately 42% of the capital stock of which is owned and controlled by Twentieth Century-Fox Film Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

8. The defendants described above in Paragraphs 1 to 7, inclusive, will be referred to sometimes hereinafter as "producer-exhibitor defendants."

9. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

[fol. 7] 10. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, and is engaged in the business of distributing motion pictures.

22. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

[fol. 8] 12. All of the defendants hereinbefore described as engaged in distribution either directly or through subsidiaries, will be referred to sometimes hereinafter as the "distributor defendants."

13. All of the defendants hereinbefore described as engaged in production, either directly or through subsidiaries, will be referred to sometimes hereinafter as "producer defendants."

III. Definition of Terms

14. The following terms when used in this complaint have the meaning indicated:[1]

Production

15. (a) *Producer.*—Any person, partnership, association or corporation engaged in the production of motion pictures.

(b) *Major Producer.*—One which produces motion pictures for release by a major distributor[2] pursuant to a prior understanding or agreement with such major distributor.

(c) *Independent Producer.*—One which is not a major producer.

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[1] For convenience, they have been grouped under headings describing the three principal branches of the industry; production, distribution and exhibition.

[2] For definition of major distributor see Paragraph 16 (b) below.

(d) *Feature.*—Any motion picture, the length of the film of which is approximately five thousand feet (usually five reels) or more.

(e) *First Class Feature.*—A feature which grosses in excess of $400,000 in film rentals from exhibition within the United States.

[fol. 9] (f) *Short Subject.*—A motion picture, the length of film of which is less than five thousand feet (five reels), and is usually two or three thousand feet.

(g) *News Reel.*—A motion picture, the length of the film of which is less than five thousand feet and which portrays events of general current interest.

Distribution

16. (a) *Distributor.*—Any person, partnership, association or corporation engaged in the business of licensing motion pictures for exhibition and distributing the positive prints of such motion pictures to exhibitors.

(b) *Major Distributor.*—A distributor which is a defendant herein or is controlled by a defendant herein.

(c) *Independent Distributor.*—One which is not a major distributor.

(d) *State Rights Distributor.*—An independent distributor which does not operate a system of national exchanges but buys from an independent producer the exclusive right to distribute its pictures in a particular state or trritory.

(e) *Exchange.*—An office maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange, and for the physical distribution of such films throughout this territory. An exchange usually has facilities for the receipt, storage and subsequent shipment to exhibitors of films and advertising matter concerning them.

(f) *Franchise.*—A licensing agreement, or series of licensing agreements entered into as part of the same [fol. 10] transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement.

(g) *Block Booking.*—The practice of licensing, or offer-

ing for license, one feature, or group of features, upon condition that the exhibitor shall also license all or a majority of all the features released by a distributor during a period of one year or more.

Exhibition

17. (a) *Exhibitor.*—Any person, partnership, association or corporation engaged in the operation of a theatre for the exhibition of motion pictures.

(b) *Affiliated Theatre.*—A theatre owned, controlled or managed by a major producer or distributor, or in the ownership, control or management of which a major producer has a financial interest.

(c) *Unaffiliated Theatre.*—One which is not an affiliated theatre.

(d) *Metropolitan Theatre.*—A theatre located in one of the following key cities: Albany, New York; Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York; Buffalo, New York; Charlotte, North Carolina; Chicago, Illinois; Cincinnati, Ohio; Cleveland, Ohio; Dallas, Texas; Denver, Colorado; Des Moines, Iowa; Detroit, Michigan; Houston, Texas; Indianapolis, Indiana; Kansas City, Missouri; Los Angeles, California; Memphis, Tennessee; Milwaukee, Wisconsin; Minneapolis, Minnesota; New Haven, Connecticut; New Orleans, Louisiana; New York, New York; Newark, New Jersey; Oklahoma City, Oklahoma; Omaha, Nebraska; Philadelphia, Pennsylvania; [fol. 11] Pittsburgh, Pennsylvania; Portland, Oregon; San Francisco, California; St. Louis, Missouri; St. Paul, Minnesota; Salt Lake City, Utah; Seattle, Washington; Washington, District of Columbia.[3]

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[3] The cities listed above are a group in which certain statistical analyses of first-run exhibition have been made by the petitioner and the term metropolitan has been adopted as a convenient means of referring to theatres in these cities. They include the ten largest cities in the United States and all of the cities in which any of the defendants maintains an exchange. They are all key cities, as defined in Paragraph 17 (o) hereof. Brooklyn was treated as a separate city in the petitioner's analyses and is, therefore, referred to as such herein.

(e) *First Run Theatre.*—One which customarily exhibits the first-class feature pictures released by one or more major distributors on a first run showing in the city or town in which it is located.

(f) *Theatre Circuit.*—A group of more than five theatres owned, controlled or managed by the same person, partnership, or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film.

(g) *Circuit Theatre.*—Any theatre in a theatre circuit.

(h) *Independent Theatre.*—One which is not a circuit or affiliated theatre.

(i) *Motion Picture Season.*—The period from September 1 of one year to August 31 of the next.

(j) *Release.*—The act of making prints of a motion picture available for public exhibition in theatres.

(k) *National Release Date.*—The date upon which a motion picture is first released generally throughout the United States.

[fol. 12] (l) *Trade Showing.*—A private exhibition of a film for the trade prior to national release.

(m) *Pre-Release.*—A public exhibition of a motion picture prior to national release.

(n) *Road Show.*—A public exhibition of a motion picture in advance of national release in a limited number of theatres at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

(o) *Key City.*—One of such size and strategic location that the first-run exhibition of a motion picture therein effectively advertises such motion picture among exhibitors and the public in a wide area surrounding such city.

(p) *First Run.*—The first exhibition of a motion picture in a given zone after national release.

(q) *Second Run.*—The exhibition of a motion picture in any zone subsequent to its first run.

(r) *Repeat or Subsequent Run.*—Any exhibition of a motion picture in a zone subsequent to its first run.

(s) *Clearance.*—The period of time which must elapse between runs of the same picture within a particular area or in specified theatres.

(t) *Zone.*—A specified geographical area within which a particular clearance operates.

IV. Growth of the Defendants

A. Paramount[1]

18. Famous Players-Lasky Corporation (now known as Paramount Pictures Inc.) was organized by Mr. Adolph [fol. 13] Zukor (Chairman of the Board of Paramount Pictures, Inc.) and Mr. Jesse L. Lasky and incorporated on July 19, 1916. The corporate name was changed to Paramount Famous Lasky Corporation on April 1, 1927 and on April 24, 1930 the name was changed to Paramount Publix Corporation.

19. In 1933 Paramount Publix Corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York. In June, 1935, it was reorganized under Section 77B of the Bankruptcy Act under the name of Paramount Pictures, Inc.

20. Twelve producing companies were merged with Famous Players-Lasky Corporation in 1917. At the same time the company integrated production and distribution by acquiring a national distribution system through merger with Artcraft Pictures Corporation and Paramount Pictures Corporation. Thereafter the company from time to time acquired interests in other producing and distributing companies.

21. At the present time pictures are produced by the parent company, Paramount Pictures, Inc., which is one of the principal producing companies in the industry. It maintains production facilities in Hollywood, California, and in New York and Long Island, New York. The follow-

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[1] The term "Paramount," as hereinafter used, includes all subsidiaries of the parent corporation, Paramount Pictures, Inc. The term "subsidiaries" as used throughout this complaint includes all corporations in which the parent owns, directly or indirectly, a percentage of the voting stock sufficiently large to permit the exercise of substantial voting control, even though such percentage is less than 51% of the total voting stock.

ing chart indicates Paramount's relative position in the industry with respect to pictures produced for the seasons mentioned:

[fol. 14]

Season	Features produced in industry	Features produced by Paramount	Season	Features produced in industry	Features produced by Paramount
1930-31	510	58	1935-36	517	50
1931-32	490	56	1936-37	535	41
1932-33	510	51	1937-38	450	40
1933-34	480	55	1938-39	526	58
1934-35	520	44			

22. Paramount Pictures, Inc., also produces approximately 45 shorts and 104 news reels each season.

23. Paramount pictures are distributed directly by it and also by its wholly owned subsidiary Paramount Film Distributing Corporation, through exchanges in 33 key cities. During the 1936-37 season Paramount distributed 59 features, 18 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

24. In 1919 Paramount entered upon a program of theatre acquisition. In that year it acquired stock interest in Southern Enterprises, Inc., which operated approximately 135 theatres in the South. In 1920 stock interest was acquired in New England Theatres, Inc., which operated approximately 50 theatres in New England states. About 1926 Paramount acquired stock interest in the Butterfield Theatre Circuit, which operated approximately 70 theatres in Michigan. During the same year stock interest was acquired in Balaban and Katz Corporation, which operated approximately 50 theatres in Illinois. Theatres were also subsequently acquired in the West and Middle West through acquisition of various theatres and of stock interests in various corporations operating theatre circuits.

[fol. 15] 25. The number and location of theatres now operated by Paramount are approximately as follows:

(a) First-run Metropolitan Theatres:

City	Number of theatres	City	Number of theatres
Atlanta, Ga.	4	Minneapolis, Minn.	6
Boston, Mass.	4	Newark, N. J.	1
Brooklyn, N. Y.	1	New Haven, Conn.	1
Charlotte, N. C.	3	New Orleans, La.	3
Chicago, Ill.	6	New York, N. Y.	1
Dallas, Texas	6	Omaha, Nebr.	3
Des Moines, Iowa	4	Salt Lake City, Utah	6
Detroit, Mich.	5	St. Paul, Minn.	4
Houston, Texas	3		
Memphis, Tenn.	2	Total	63

(b) Other theatres operated by Paramount are approximately as follows:

State	Number of theatres	State	Number of theatres
Alabama	33	New Hampshire	10
Arizona	8	New Jersey	2
Arkansas	47	New Mexico	7
California	4	New York	24
Colorado	9	North Carolina	66
Connecticut	5	North Dakota	10
Florida	109	Ohio	16
Georgia	34	Oklahoma	6
Idaho	9	Pennsylvania	72
Illinois	116	Rhode Island	3
Indiana	8	South Carolina	23
Iowa	60	South Dakota	20
Kentucky	11	Tennessee	26
Louisiana	17	Texas	199
Maine	39	Utah	15
Maryland	1	Vermont	8
Massachusetts	78	Virginia	17
Michigan	11	West Virginia	3
Minnesota	32	Wisconsin	5
Mississippi	35		
Missouri	1	Total	1,210
Nebraska	11		

26. The parent corporation, Paramount Pictures, Inc., has gross assets of approximately $90,000,000. Its con- [fol. 16] consolidated gross income was in excess of $100,000,000 for the fiscal year ended in 1939.

B. Loew's[5]

27. In about the year 1905, the late Marcus Loew (who, before his death in 1927, was president of Loew's, Incorporated), in association with others, began to operate some so-called "penny arcades" in New York City and one in Cincinnati. Shortly thereafter, certain of these penny arcades were remodeled so as to permit, in part of the premises, the exhibition of single reel motion pictures, for which an admission price of 5¢ was charged. In 1907 the enterprise acquired its first theatre. It was located in Brooklyn, New York, and was operated with vaudeville and single reel pictures.

28. The motion picture subjects were bought by Mr. Loew from various picture producers and exhibited in the Loew theatres; the custom was to buy one print of each subject. By the year 1910, Mr. Loew and his associates owned stock interests in a number of corporations operating store shows and theatres in New York and elsewhere, all of them showing vaudeville and short-subject pictures.

29. In 1910, Mr. Loew and his associates organized Loew's Consolidated Enterprises, which, in 1911, was succeeded by Loew's Theatrical Enterprises.

30. Between 1911 and 1919, Loew's Theatrical Enterprises, through subsidiary corporations, extended its activities in the operation of theatres devoted to motion pic- [fol. 17] tures or a combination of vaudeville and motion pictures. Additional theatres were acquired in New York City and in certain cities other than New York. By 1919, Loew's Theatrical Enterprises had financial interests in approximately 56 theatres.

31. In October 1919, Loew's, Incorporated, was organized, and acquired all of the outstanding stock of Loew's Theatrical Enterprises. The extent of the theatre business of Loew's, Incorporated, has increased gradually since 1919.

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[5] The term "Loew's," as hereinafter used, includes all subsidiaries of the parent corporation, Loew's, Incorporated.

32. The number and location of the theatres now operated by Loew's is approximately as follows:

(a) Metropolitan First-run Theatres:

City	Number of theatres	City	Number of theatres
Atlanta, Ga.	1	Newark, N. J.	1
Baltimore, Md.	1	New Haven, Conn.	2
Boston, Mass.	2	New Orleans, La.	1
Brooklyn, N. Y.	1	New York, N. Y.	2
Cleveland, Ohio	2	Pittsburgh, Pa.	1
Denver, Colo.	1	St. Louis, Mo.	1
Houston, Texas	1	San Francisco, Calif.	1
Indianapolis, Ind.	1	Washington, D. C.	3
Kansas City, Mo.	1		
Memphis, Tenn.	1	Total	24

(b) Other theatres are located as follows:

State	Number of theatres	State	Number of theatres
Connecticut	8	New Jersey	2
Delaware	1	Ohio	8
District of Columbia	1	Pennsylvania	2
Indiana	2	Rhode Island	1
Kentucky	1	Tennessee	1
Maryland	2	Virginia	2
Massachusetts	3		
New York	64	Total	98

[fol. 18] 33. In 1920, Loew's, Incorporated, entered the field of production and distribution of motion pictures by acquiring the outstanding stock of Metro Pictures Corporation. In 1924, Metro Pictures Corporation merged with Goldwyn Pictures Corporation under the name of Metro-Goldwyn Pictures Corporation. The result of this merger was that Loew's, Incorporated, became the owner of all of the common stock of Metro-Goldwyn Pictures Corporation. At about the time of this merger, Louis B. Mayer Pictures, Inc., contracted to supervise the production of all pictures produced by the merged company, and turned over to Metro-Goldwyn Pictures Corporation certain of the assets of Louis B. Mayer Pictures, Inc. The business of Metro-Goldwyn Pictures Corporation was subsequently assumed by Metro-Goldwyn-Mayer Corporation. On December 31, 1937, Metro-Goldwyn-Mayer Corporation ceased to do business and the production activities were taken over by Loew's, Incorporated..

34. The following tabulation indicates the feature pictures produced by Loew's as compared with the total number of features produced, for the nine year period ending with the 1938-39 season:

Season	Features produced in industry	Features produced by Loew's	Season	Features produced in industry	Features produced by Loew's
1930-31	510	43	1935-36	517	43
1931-32	490	40	1936-37	535	40
1932-33	510	37	1937-38	450	41
1933-34	480	44	1938-39	526	51
1934-35	520	42			

[fol. 19] 35. For the eight year period ending with the 1937-38 season, Loew's produced an average of 36 short subjects per year.

36. Loew's product is distributed through exchanges maintained by it in 31 key cities. During the 1936-37 season Loew's distributed 50 features, 10 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

37. The parent corporation, Loew's, Incorporated, has gross assets of approximately $150,000,000. During the fiscal year ending in 1939, its gross income was in excess of $100,000,000.

C. Fox [6]

38. Twentieth Century-Fox Film Corporation was incorporated under the name of Fox Film Corporation on February 1, 1915. Fox Film Corporation was voluntarily reorganized with the consent of its creditors, and security holders in the summer of 1933. In August 1935, Fox Film Corporation acquired all the assets of Twentieth Century Pictures, Inc., a producing and distributing company, and the name of the company was changed to Twentieth Century-Fox Film Corporation.

39. The following chart indicates the feature pictures produced by Fox as compared with the total number of

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[6] The term "Fox," as hereinafter used, includes all subsidiaries of Twentieth Century-Fox Film Corporation and of National Theatres Corporation.

[fol. 20] features produced for the nine year period ending with the 1938-39 season:

Season	Features produced in industry	Features produced by Fox	Season	Features produced in industry	Features produced by Fox
1930–31	510	48	1935–36	517	52
1931–32	490	46	1936–37	535	52
1932–33	510	41	1937–38	450	49
1933–34	480	46	1938–39	526	56
1934–35	520	40			

40. Movietonews, Inc., a wholly owned Fox subsidiary, for the eight year period ending 1937-38, produced an average of 20 shorts and 104 news reels per year.

41. Fox product is distributed directly by Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Distributing Corporation and Twentieth Century-Fox Corporation of Texas, wholly owned subsidiaries, though exchanges in 31 key cities. During the 1936-37 season Fox distributed 65 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

42. In August 1925, Fox Film Corporation acquired approximately one-third of the common stock of West Coast Theatres, Inc., a company operating theatres in California and other western states; and, in March 1928, Fox Film Corporation purchased all the common stock of Wesco Corporation (now National Theatres Corporation), a holding company for theatre operating corporations.

[fol. 21] 43. In 1934, Wesco Corporation readjusted its capital structure by voluntary agreement among its creditors and stockholders, pursuant to which The Chase National Bank of the City of New York acquired 58% of the stock of Wesco Corporation and Fox Film Corporation retained 42%. At about the same time the Chase Bank acquired a substantial stock interest in Fox Film Corporation and still owns a substantial interest in Twentieth Century-Fox Film Corporation. The name of Wesco Corporation was thereafter changed to National Theatres Corporation and the Chase Bank still retains 58% of the stock of National Theaters Corporation. National Theatres Corporation operates theatres in the middle and far western

parts of the United States through numerous subsidiary operating corporations.

44. In 1937, Twentieth Century-Fox Film Corporation acquired all the common stock of Roxy Theatre, Inc., which owns the Roxy Theatre, a large first-run theatre in New York City.

45. The location and number of theatres now operated by Fox is approximately as follows:

(a) Metropolitan first-run theatres:

City	Number of theatres	City	Number of theatres
Denver, Colo.	4	Portland, Ore.	4
Detroit, Mich.	1	San Francisco, Calif.	4
Kansas City, Mo.	3	Seattle, Wash.	5
Los Angeles, Calif.	5		
Milwaukee, Wis.	3	Total	30
New York City	1		

[fol. 22] (b) Other theatres are located as follows:

State	Number of theatres	State	Number of theatres
Arizona	7	Nebraska	19
California	196	New Mexico	6
Colorado	32	Oregon	9
Idaho	9	Utah	2
Illinois	21	Washington	23
Iowa	6	Wisconsin	50
Kansas	56	Wyoming	14
Michigan	5		
Missouri	45	Total	508
Montana	17		

46. Twentieth Century-Fox Film Corporation has gross assets of approximately $60,000,000. During the fiscal year ended in 1939, its consolidated gross income was approximately $50,000,000.

D. Warner[7]

47. Warner Bros. Pictures, Inc., was incorporated in 1923 for the purpose of producing, distributing, and ex-

[7] The term "Warner," as hereinafter used, includes all subsidiaries of the parent corporation, Warner Bros. Pictures, Inc.

hibiting motion pictures. At that time, it owned and operated a motion picture studio in Hollywood, but had no theatres.

48. The Warner Company became interested in experimental work in the development of talking pictures, and, in August 1926, the first public performance of talking pictures was presented in the Warner Theatre in New York City.

49. Warner is one of the principal producing companies in the industry and maintains production facilities at Burbank and Hollywood, California, and Brook-
[fol. 23] During the 1936-37 season Vitagraph distributed 60 features lyn, New York. The number of features produced by it as compared with the total number of features produced for the nine year period ending with the 1938-39 season is indicated by the following tabulation:

Season	Features produced in industry	Features produced by Warner	Season	Features produced in industry	Features produced by Warner
1930-31	510	69	1935-36	517	58
1931-32	490	56	1936-37	535	58
1932-33	510	53	1937-38	450	52
1933-34	480	63	1938-39	526	54
1934-35	520	51			

50. During the eight year period ending 1937-38 Warner produced an average of 102 short subjects per year.

51. In 1925 Warner Pictures, Inc. acquired Vitagraph, Inc., which operated 34 exchanges in the principal cities of the United States and Canada, and two other affiliated companies which operated exchanges in foreign countries. Warner product is distributed through Vitagraph, Inc. During the 1936-37 season Vitagraph distribtued 60 features, 26 more than it produced, and ordinarily distributes some features each season produced by others for release by it.

52. Warner Bros. Pictures, Inc., entered the exhibition filed in December 1924, when it acquired a theatre in Youngstown, Ohio. In 1925, it acquired 13 additional theatres in various parts of the United States. In Decem-

ber 1928, the corporation acquired a majority of the stock of Stanley Company of America, which operated, directly or through subsidiaries, 182 theatres and had partial stock interests in theatre companies that owned or leased 51 theatres. The theatres of the Stanley Company of Amer- [fol. 24] ica were located in the Middle Atlantic States and the District of Columbia.

53. Subsequently, the company acquired interests in theatres in Missouri, Pennsylvania, Maryland, New Jersey, Ohio, Connecticut, New York, Illinois, Wisconsin, Virginia, and Kentucky.

54. The approximate number and locations of theatres now operated by Warner are as follows:

(a) Metropolitan First-run theatres:

City	Number of theatres	City	Number of theatres
Albany, N. Y.	2	New Haven, Conn.	1
Baltimore, Md.	1	New York, N. Y.	2
Brooklyn, N. Y.	1	Oklahoma City, Okla.	7
Charlotte, N. C.	1	Philadelphia, Pa.	8
Cleveland, Ohio	2	Pittsburgh, Pa.	2
Los Angeles, Calif.	2	Washington, D. C.	2
Memphis, Tenn.	1		
Milwaukee, Wis.	1	Total	35
Newark, N. J.	2		

(b) Other theatres are located as follows:

State	Number of theatres	State	Number of theatres
California	10	Ohio	36
Connecticut	34	Oklahoma	7
Delaware	6	Oregon	2
District of Columbia	14	Pennsylvania	185
Illinois	19	Virginia	9
Indiana	3	Washington	3
Kentucky	8	West Virginia	11
Maryland	7	Wisconsin	18
Massachusetts	16		
New Jersey	90	Total	522
New York	44		

55. Warner Bros. Pictures, Inc., has gross assets of approximately $150,000,000. During the fiscal year ended 1939 its gross income exceeded $100,000,000.

[fol. 25] E. RKO[8]

56. Radio-Keith-Orpheum Corporation was incorporated under the laws of the State of Maryland on October 25, 1928. Since its incorporation it has been primarily a holding company for subsidiaries engaged in the production, distribution, and exhibition of motion pictures. Shortly after its organization, Radio-Keith-Orpheum Corporation secured control of its principal exhibition and production companies, Keith-Albee-Orpheum Corporation and FBO Productions, Inc., respectively.

57. Organized on January 28, 1928, as a Delaware corporation, Keith-Albee-Orpheum Corporation acquired, in February of the same year, all of the outstanding stock of B. F. Keith Corporation and approximately 90% of the outstanding stock of Orpheum Circuit, Inc. Subsidiaries of B. F. Keith Corporation owned and operated in various cities in the eastern part of the United States a large number of theatres which, although originally devoted to the performance of vaudeville, were converted and used for the exhibition of motion pictures. Orpheum Circuit, Inc., directly or through subsidiaries, operated theatres throughout the Midwest and Western parts of the United States.

58. In addition to Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., Radio-Keith-Orpheum Corporation obtained the controlling interest in numerous other com-
[fol. 26] panies engaged in the motion picture exhibition business, the most important being RKO Proctor Corporation and RKO Midwest Corporation. RKO Proctor Corporation operated the Proctor circuit of theatres located in the New York metropolitan district and in up-state New York. RKO Midwest Corporation controlled a group of theatres in Ohio and Michigan.

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[8] The term "RKO," as hereinafter used, includes all subsidiaries of Radio-Keith-Orpheum Corporation and Keith-Albee-Orpheum Corporation.

59. The number and location of theatres now operated by RKO is approximately as follows:

(a) Metropolitan First-run theatres:

City	Number of theatres	City	Number of theatres
Albany, N. Y.	2	Newark, N. J.	2
Boston, Mass.	2	New Orleans, La.	1
Brooklyn, N. Y.	2	New York, N. Y.	1
Chicago, Ill.	1	Omaha, Nebr.	1
Cincinnati, Ohio	6	San Francisco, Calif.	1
Cleveland, Ohio	2	St. Paul, Minn.	2
Denver, Colo.	1	Washington, D. C.	1
Des Moines, Iowa	1		
Los Angeles, Calif.	2	Total	29
Minneapolis, Minn.	1		

(b) Other theatres are located as follows:

State	Number of theatres	State	Number of theatres
California	1	New Jersey	14
Illinois	2	Ohio	13
Iowa	5	Rhode Island	2
Massachusetts	3	West Virginia	3
Michigan	7		
New York	53	Total	103

60. The name of FBO Productions, Inc., the principal producing company absorbed by Radio-Keith-Orpheum Corporation, was ultimately changed to RKO Radio Pictures, Inc. RKO maintains production facilities in Hollywood and Culver City, California.

[fol. 27] 61. The number of features produced by RKO during the nine year period ending 1938-39 as compared with the total number of feature pictures produced during that period is indicated by the following chart:

Season	Features produced in industry	Features produced by RKO	Season	Features produced in industry	Features produced by RKO
1930-31	510	32	1935-36	517	43
1931-32	490	48	1936-37	535	39
1932-33	510	45	1937-38	450	41
1933-34	480	40	1938-39	526	49
1934-35	520	40			

62. In January 1931, Radio-Keith-Orpheum Corporation took over, through subsidiaries, the news reel and other production business and facilities of Pathe Exchange, Inc.

63. For the eight year period ending 1937-38 RKO Radio Pictures, Inc. produced an average of 33 short subjects per year and the Van Beuren Corporation, a wholly owned subsidiary, produced an average of 48 short subjects per year. During the same period Pathe News, Inc., a wholly owned subsidiary, produced an average of 10 short subjects and 104 news reels per year.

64. RKO product is distributed by RKO Radio Pictures, Inc. through its exchanges located in 32 cities. During the 1936-37 season RKO distributed 47 features, 8 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

65. On January 27, 1933, Radio-Keith-Orpheum Corporation went into an equity receivership and Irving Trust Company was appointed Receiver. On June 8, 1934, [fol. 28] Radio-Keith-Orpheum Corporation filed a petition for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the Southern District of New York. Irving Trust Company was appointed Trustee in reorganization. A plan of reorganization was approved January 17, 1939, confirmed April 11, 1939, and such approval and confirmation were affirmed by the Circuit Court of Appeals for the Second Circuit on September 8, 1939.

66. The parent corporation has gross assets of approximately $70,000,000. During the fiscal year ended in 1939 its consolidated gross income was about $40,000,000.

F. Columbia[9]

67. Columbia Pictures Corporation was incorporated in the State of New York on January 10, 1924. Its organizers and, at that time, sole stockholders were Joe Brandt, Harry Cohn, and Jack Cohn. Commencing on February 4, 1925, with the acquisition of the assets of C. B. C. Film Sales Corporation, Columbia Pictures Corporation bought up exchanges throughout the country for the marketing of its

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[9] The term "Columbia," as hereinafter used, includes all subsidiaries of the parent corporation, Columbia Pictures Corporation.

product. By 1929, its distribution system was organized upon a national scale. In 1930, it secured exchanges for the foreign distribution of its film.

68. During 1928, Columbia acquired, through merger, Screen Snapshots, Inc., Hall Room Boys Photoplays, Inc., Starland Revue, Inc., all producers of short subjects, and in 1931 secured 50% and, in 1937, the remaining 50% of [fol. 29] the capital stock of Screen Gems, Inc., also a producer of short subjects.

69. The following chart shows the number of features produced by Columbia, as compared with the total number of features produced during the nine year period ending with the 1938-39 season:

Season	Features produced in industry	Features produced by Columbia	Season	Features produced in industry	Features produced by Columbia
1930-31	510	27	1935-36	517	36
1931-32	490	31	1936-37	535	38
1932-33	510	36	1937-38	450	39
1933-34	480	44	1938-39	526	54
1934-35	520	39			

70. During the eight year period ending 1937-38, Columbia Pictures Corporation produced an average of 39 short subjects and Screen Gems, Inc., produced an average of 22 short subjects per year.

71. Columbia product is distributed through its 32 exchanges located in key cities. During the 1936-37 season Columbia distributed 51 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

72. The parent corporation has gross assets of approximately $15,000,000. During the fiscal year ended in 1939 its gross income was about $20,000,000.

G. Universal[10]

73. Universal Pictures Corporation, formerly Universal Film Manufacturing Company, was incorporated in New

[10] The term "Universal," as hereinafter used, includes all subsidiaries of the parent corporation, Universal Corporation.

York, in 1912, and with its subsidiaries, engaged in the [fol. 30] production and distribution of motion pictures in the United States and throughout the world.

74. Universal Pictures Company, Inc., was formed on January 10, 1925, and at approximately the same time purchased the entire outstanding capital stock of Universal Pictures Corporation. From 1925 to 1936, Universal Pictures Corporation was the production branch of its parent company, Universal Pictures Company, Inc. During such period, motion pictures produced by Universal Pictures Corporation were distributed by Universal Film Exchanges, Inc. and Big U Film Exchange, Inc.

75. In April 1936, Universal Corporation was organized for the chief purpose of acquiring the controlling stock interest of Carl Laemmle and his associates in Universal Pictures Company, Inc., a producer, and Big U Film Exchange, a distributor of motion pictures.

76. The number of features produced by Universal, as compared with the total number of features produced during the nine year period ending 1938-39, is indicated by the following tabulation:

Season	Features produced by industry	Features produced by Universal	Season	Features produced by industry	Features produced by Universal
1930-31	510	22	1935-36	517	27
1931-32	490	32	1936-37	535	40
1932-33	510	28	1937-38	450	45
1933-34	480	38	1938-39	526	45
1934-35	520	39			

77. For the eight year period ending with the 1937-38 season, Universal produced an average of 111 short subjects and 104 news reels per year. During the 1936-37 season, [fol. 31] Universal distributed 40 features, no more than it produced, but it ordinarily distributes each season some features produced by others for release by it.

78. In January 1926, Universal Pictures Corporation and its president, Carl Laemmle, secured a substantial stock interest in Universal Chain Theatres Corporation, which, through subsidiaries and affiliated companies, operated a large number of theatres. In 1928, Universal Chain Theatres Corporation and its affiliates operated about 315 theatres in Canada, the District of Columbia, and 20 States

of the United States, including the Griffith Amusement Company circuit of 40 theatres in Oklahoma and Texas, and the Schine chain of 90 theatres in New York and Ohio. A substantial number of its theatres were disposed of between 1929 and 1931. It went into receivership in 1933, and its remaining theatres were sold by the receiver.

79. The dissolution of Universal Pictures Corporation in December 1936, was accompanied by a transfer of its assets to Universal Pictures Company, Inc. Since January 1, 1937, Universal Pictures Company, Inc., has been engaged in the production of motion pictures which are distributed in the United States by Big U Film Exchange, Inc., and Universal Film Exchanges, Inc.

80. Universal Pictures Company, Inc., has gross assets of approximately $12,000,000. During the fiscal year ended in 1939, its gross income was about $20,000,000.

[fol. 32] H. United Artists[11]

81. United Artists Corporation was organized in 1919, by a group of individuals who had achieved prominence in the production branch of the motion picture industry. The purpose of the corporation was to distribute the features produced by its organizers.

82. Most of the features distributed by United Artists Corporation have been first-class features, although as a general rule it does not release as many pictures per year as the other major companies.

83. The following tabulation indicates the number of United Artists releases as compared with the total number of features produced during the nine year period ending 1938-39:

Season	Features produced in industry	Features released by United Artists	Season	Features produced in industry	Features released by United Artists
1930-31	510	13	1935-36	517	17
1931-32	490	14	1936-37	535	19
1932-33	510	16	1937-38	450	14
1933-34	480	20	1938-39	526	18
1934-35	520	19			

[11] The term "United Artists," as hereinafter used, refers to the defendant, United Artists Corporation.

84. United Artists now distributes pictures for the following producers among others: Samuel Goldwyn, Charles Chaplin, Mary Pickford, Alexander Korda, and London Film Productions, Ltd., Selznick International, Edward Small, Sol Lesser, Hal Roach, David Loew, Ernest Lubitsch, Walter Wanger, and Richard Rowland.

[fol. 33] 85. United Artists maintains exchanges in 26 cities.

86. The corporation is owned by five stockholders, Charles Chaplin, Samuel Goldwyn, Mary Pickford, the Estate of Douglas Fairbanks, and Alexander Korda. It issues no public statement of gross assets or business done but for the fiscal year ended in 1939 its gross income exceeded $10,000,000.

I. *Joint Theatre Interests*

87. Each of the producer-exhibitor defendants is jointly interested financially in one or more theatres with one or more of the other producer-exhibitor defendants, through profit sharing arrangements with respect to particular theatres; through so-called pools where several theatres owned or controlled by two or more are operated as a unit; through direct or indirect ownership of stock in a single theatre operating corporation by two or more of such defendants; or through arrangements where one owns or leases a theatre and the other manages it. Such joint interests include all of the following combinations with respect to one or more theatres: Fox with Loew's, Fox with Paramount, Fox with RKO, Fox with Warner, Loew's with Paramount, Loew's with RKO, Loew's with Warner, Paramount with RKO, Paramount with Warner and RKO with Warner.

88. There are about 200 theatres in the United States in which such joint interests are held, including a substantial number of metropolitan first-run theatres.

89. In addition to the foregoing joint theatre interests of the producer-exhibitor defendants with each other there are [fol. 34] numerous other joint theatre interests where executive employees, or managing agents of one producer-exhibitor defendant have direct or indirect stock interests in a theatre operating corporation in which another pro-

ducer-exhibitor defendant also owns a direct or indirect stock interest.

V. Competitive Conditions in the Motion Picture Industry

A. Limited Source of Supply of Features and Particularly First Class Features

90. In the early stages of motion picture production films possessed entertainment value for the public merely because of the novelty of watching figures and objects in motion projected on a screen. They were priced by the foot or by the reel without regard to their quality as dramatic productions. As the novelty wore off, it became increasingly necessary to produce films which had stories of dramatic interest, employed well-known acting talent and eliminated technical faults in photography and projection.

91. By 1908 there were ten well established companies in the United States which were either producing or importing motion picture films and selling them to independent exchanges scattered throughout the country, but operated on a local basis. From these exchanges films were distributed weekly to exhibitors for a rental based on footage, although some attempts had been made to produce and market individually features of distinctive quality. At that time there were between 125 and 150 exchanges and 6,000 exhibitors in the United States.

[fol. 35] 92. In 1908, largely to escape the effects of a patent war conducted chiefly by the Edison companies, which held basic camera and projection equipment patents, the ten leading manufacturers decided to pool their interests and patents in the Motion Picture Patents Company. These companies were: Biograph, Kalem, and Pathe, in New York; Vitagraph in Brooklyn; Edison in New Jersey; Lubin in Philadelphia; and Essanay, Kleine, Meli and Selig in Chicago.

93. Each manufacturer took a license from the Patents Company entitling it to produce and lease motion pictures. By a system of licenses extending to distribution and exhibition, control of the entire industry was attempted. The licenses generally covered all branches of the industry, including cameras, film, and projectors.

94. The General Film Company was then organized to distribute the films of the ten producers on a national scale. Exchanges were either established by it or existing exchanges bought out. Other distributors had to secure the films of other producers in order to continue their business.

95. The Patents Company and the General Film Company were met by a militant group of producers, distributors, and exhibitors who operated without their licenses, and a number of law suits followed. Private suits for damages under the antitrust laws were instituted by them, and finally the Government instituted a suit in equity in 1912 which brought about the dissolution of the Motion Picture Patents Company by a decree dated January 24, 1916.

96. Meanwhile, the art of producing motion pictures had been going forward. The standardized film of one reel of [fol. 36] 1,000 feet was rapidly displaced after 1912 by the feature picture of five reels or more. While the Motion Picture Patents Company adhered to the idea of short, standardized films of one reel and a daily change of program to be sold on a footage basis, others who had made a careful study of audience reaction were convinced that the time had arrived for further advances in production. Complete stories, plays, and books were translated into motion pictures. Among the early advocates of this change was Adolph Zukor, who formed the Famous Players Company in 1912, and produced "Queen Elizabeth," in which Sarah Bernhardt appeared, and soon "The Prisoner of Zenda," with James K. Hackett, a well-known actor, was produced.

97. From a position of comparative obscurity in 1912, Adolph Zukor and his Famous Players Company by 1916 had become the dominating influence in the industry. The feature pictures of this company were in demand the country over and were recognized generally as the best pictures on the market. A national distribution system had been secured through the acquisition of the control in that year of Paramount Pictures Corporation, which had been organized two years before by William W. Hodkinson, a San Francisco distributor.

98. The cost of making pictures had mounted abruptly, due principally to the rise in salaries of stars, directors, and technicians of all kinds. When these costs were passed on to the distributors and exhibitors, who had largely remained

independent of producers, great alarm was felt by the persons engaged in these two branches of the industry, and resulted, in 1917, in the organization of First National [fol. 37] Exhibitors Circuit, an association of exhibitors, which, through production and distribution units financed by its membership under a system of franchises, sought to assure its membership of a constant, satisfactory supply of pictures.

99. Many of the theatres in the new association were and had been customers of Famous Players. Thus the market for the pictures of that company was being threatened, and soon stars, feature players, directors and other personnel, were leaving the employ of Famous Players-Lasky for that of First National Exhibitors Circuit.

100. In 1919 Famous Players-Lasky Company began its acquisition of theatres as hereinbefore recited. By 1930, as hereinbefore recited, five of the major companies, Paramount, Loew's, Warner, Fox and RKO, had all developed nationwide businesses, in which production, distribution and exhibition were integrated. During the interim feature production costs had mounted steadily and the returns from their exhibition kept pace. This trend was accelerated in 1927 by the introduction of commercially profitable sound films which required costly equipment to produce, with the result that by 1930 the best features produced by each of these companies were costing as much as $500,000 or more each to produce.

101. By 1930 the eight defendant distributors were releasing substantially all of the features produced in the United States at a cost of more than $250,000 as they were the only ones which had the national distribution systems and established first-run outlets necessary to make the production of such features profitable. Since that date, they [fol. 38] have continued to maintain complete control of the distribution of such features, although many of them have been produced by producers not employed by a major company but pursuant to arrangements made preceding the production of such films for release by a major distributor. Such arrangements generally included the use of equipment owned by, or production talent under contract to, one or more of the defendants. These arrangements have often

included financing of the production directly by the major distributor involved or the borrowing of capital by the producer upon its showing that it has been assured of release through a major distributor. Ordinarily, no funds have been or are available for this type of production in the absence of such an assurance.

102. As the equipment and technical and artistic talent necessary to produce profitable features became more costly, competition for the use of such talent became even more costly to producers; and since 1930 the major producers have preferred to loan and exchange the highest priced technical and artistic talent which they may have under exclusive contract to and with each other on standardized terms rather than drive the price of such talent higher by competing for the privilege of placing it under contract in the first instance.

103. The producer-exhibitor defendants have an additional incentive to pool their production resources arising out of the fact that each owns theatres which share the profits of successful features released by any of the others. Ordinarily, the major producers make available to each other their stars, feature players, directors and other personnel and their sets, scenery and other technical equip- [fol. 39] ment necessary for the production of motion pictures while they do not readily make them available to independent producers. Even where such talent has been made available to independent producers, the terms have frequently been discriminatory as compared to the terms upon which it has been made available to major producers.

104. Since 1933 the number of instances in which stars, feature players, directors, writers, cameramen or other production talent under contract to a defendant has been loaned to another major producer as compared with loans to independent producers during the same period are approximately as follows:

Number of loans by defendants

Defendant	To major producers	To independent producers	Defendant	To major producers	To independent producers
Loew's	610	56	Fox	251	7
Paramount	439	46	Columbia	175	36
Warner	223	12	Universal	198	11
RKO	109	12			

105. Fox, Loew's, Paramount, RKO and Warner have collectively received during the past five years approximately 70 per cent of the total film rentals received by all distributors of motion pictures from exhibition in the United States, and Columbia, United Artists and Universal received about 25 per cent of such total film rentals. Fox, Loew's, Paramount, RKO and Warner have during each of said years collectively released about 80 per cent of all first-class features, and Columbia, United Artists and Universal have during each of said years released about 15 per cent of all first-class features. The first-class features represent [fol. 40] those which have generally cost the most money to produce, have received the most intensive exploitation by distributors, have been successful in attracting patrons to theatres, and have yielded the largest gross box-office returns to exhibitors. No other distributor has released more than 1 per cent of such features during any of said years and in no year have all other distributors combined released more than 5 per cent of such features.

B. Block Booking and Blind Selling in Long Term Contracts

106. In the early stages of motion picture distribution, the uniform quality of films and dependence by exhibitors on their novelty, rather than quality, to attract audiences, was well adapted to the method of licensing still employed in the industry. Then as now films were licensed sight unseen in large groups for delivery at weekly intervals over a period of a year or more.

107. License contracts today ordinarily contain the terms on which a group of features are to be exhibited over a period of at least one year. With the exception of United Artists, which usually makes a separate contract for the films released by each of its producers, the distributors cover in one license contract all of the features released during the one year period or a lesser number to be selected from all released, as and when released. The licenses are generally negotiated prior to the commencement of each motion picture season before any of the features covered have been released. The exhibitor has no knowledge of the quality or character of the features he licenses other than

[fol. 41] data concerning the stories, directors, stars and featured players, supplied as to some pictures by some of the distributors in prospectuses of the coming season's production program and the exhibitor's past experiences with similar productions. Such production programs are always subject to change without notice to any exhibitor and his license contract offers no protection against loss which may result from the failure of the pictures produced to live up to the claims made for them as box-office attractions at the time they are sold.

108. The quality of feature pictures, as box-office attractions, varies widely even with respect to those released by the same company and they are accordingly priced in various brackets in the license agreement in accordance with anticipated quality. The feature released by any of the defendant distributors during any one season which is the most successful in attracting theatre audiences will ordinarily gross more than $1,000,000 in film rental and play in more than 10,000 theatres, in the United States, while the least successful feature will ordinarily gross less than $200,000 in film rental and play in less than 5,000 theatres, in the United States. The features assigned to the top price bracket in license agreements ordinarily have rental terms based upon a percentage of the box-office receipts, sometimes against a guaranteed figure, and those in the lowest price brackets are ordinarily licensed for a flat rental. The pictures in each bracket are usually untitled and unidentified.[12] The result is that most features are not definitely [fol. 42] allocated to a price bracket until after their release and the question of proper allocation is a continuous source of dispute between exhibitors and distributors.

109. Each distributor defendant releases each year a certain number of features (generally those in the lowest price bracket) which most exhibitors do not wish to exhibit at all. Therefore, in negotiating licenses, the distributor attempts to secure a commitment by the exhibitor to play all of the features released by it during the one year period

[12] An example of such bracketing is as follows: Four features at 35%; six at 30%; ten at 25%; ten at $200.00 flat rental; and ten at $100.00 flat rental.

with as small a cancellation or rejection privilege as possible and the exhibitor attempts to limit his commitment by either obtaining as wide a rejection or cancellation privilege as possible or sometimes by licensing a specific number of features, less than all released during such period. The extent to which the exhibitor is able to limit his commitments to those features which he thinks he can profitably exhibit depends upon the relative bargaining strength of the parties. In view of the limited supply of profitable features, a defendant distributor, in dealing with small independent exhibitors with limited buying power, is ordinarily able to compel the exhibitor to commit himself to play many features which he does not want and cannot profitably exhibit as a condition of licensing other features which he does want and can profitably exhibit. To the extent that such commitments are made, the market for films of other distributors which the exhibitor wants to play is correspondingly limited, and one result of the tying of unprofitable features to profitable features in the license contracts of the major distributors has been to prevent or discourage the [fol. 43] entry into the market of independent producers and distributors. Another result of such block booking has been to encourage the production of features by the major companies which are not sufficiently attractive to be sold on their own merits but which may be successfully marketed by block booking them with other features of superior quality.

110. While the restrictive effect of such block booking is substantially lessened in the case of United Artists by the employment of separate license agreements for each of its producers, most of which produce no more than four pictures a year, this defendant generally negotiates the licenses for all of its producers' pictures with the same exhibitor at the same time and sometimes conditions the sale of one producer's pictures upon the purchase by the exhibitor of the pictures of another producer which he does not desire to use.

111. In addition to the rental to be paid, the license contracts also ordinarily specify the run on which the features are available to the exhibitor, the clearance, if any, which his theatre shall have over competing theatres, and usually

specify the minimum (adult and children, matinee and evening) admission prices to be charged by his theatre when exhibiting such features.

C. Run, Clearance, and Minimum Admission Prices

112. Although the entertainment value of the feature pictures released in the United States from week to week varies widely, theatre admission prices are generally uniform at a particular theatre regardless of the quality of the particular feature exhibited. Under the prevailing sys- [fol. 44] tem of licensing features for a particular run for periods of a year or more with clearance at a specified mimimum admission price, each theatre ordinarily plays all of the feature pictures it exhibits on the same run with the same clearance. All theatres which play features on the same run in the same competitive area ordinarily play them at the same admission price regardless of changing competitive conditions which might otherwise affect admission prices during the period of the license.

113. The incorporation of the foregoing provisions with respect to run, clearance and admission prices in annual licensing agreements and franchises, has tended to stabilize the playing positions and operating policies of particular theatres from year to year and the negotiation of license contracts with subsequent-run exhibitors is always subject to whatever rights have been established by license agreements with the prior-run exhibitors. Even where there are two or more theatres in a position to compete for the privilege of exhibiting the same features upon the same run, negotiations are seldom conducted simultaneously with the competing exhibitors for the licensing of pictures on such run. The distributor ordinarily negotiates the rental terms to be paid without any competitive bidding and only if an agreement is not reached with the exhibitor with whom negotiations for a certain run are started are negotiations undertaken with a competing exhibitor for that run.

114. In the very early years of the motion picture industry the age of films was not a significant factor. As films acquired plot content and as certain players became [fol. 45] known to the motion picture public, however, it became important to exhibitors to show them as early

as possible after release. Prior to the advent of the feature picture, films were licensed generally on the basis of age, with the license fee becoming smaller as the reel grew older. There was evolved during this period the concept of "run," which eventually displaced the earlier method of licensing pictures, and instead of licensing pictures one week old, two weeks old, etc., exhibitors licensed product on first run in a given territory, on second run in said territory a specified period of time after first run, on third run in said territory a specified period of time after second run, etc. As the form of the motion picture developed from single reel to the feature picture and as certain players attained great popularity, motion picture theatres were able to command higher admission prices, and the operation of de-luxe first-run theatres in large cities charging a high admission price became feasible and profitable. From about 1915 or 1916, when the first of these de-luxe theatres, designed primarily for motion picture exhibition at advanced admission prices, were constructed, exhibitors operating such theatres sought to obtain and frequently did obtain long periods of protection over all other theatres in the city and surrounding territory where they were located.

115. From about 1915 to about 1931 it was frankly conceded by distributors and exhibitors generally that uniform runs and clearances were desirable, even though arrived at as the result of agreement between distributors, and many efforts were made to eliminate differences in the run and protection terms on which distributors dealt with theatres. [fol. 46] During this period a number of contracts and franchise agreements provided in effect that the run and protection terms therein granted by a given distributor were to be the same as those granted to the theatre or theatres involved by other distributors.

116. In about 1930, after the producer-exhibitor defendants had substantially completed their theatre acquisition programs, they made a concerted effort to establish uniform zoning and protection plans throughout the United States through the Film Boards of Trade.[13] It was the pur-

[13] Trade practice enforcement bodies located in each city where the defendants maintained exchanges.

pose of these plans to establish in each exhibition territory a uniform plan of zoning and protection which would give a definite status to each theatre in the territory and which would prevent any distributor from dealing with such theatre with respect to run, zoning, or protection, on any terms other than those provided for in the plan. Such uniform zoning and protection plans, through agreements of the exhibitors and the distributors, were adopted for the 1930-31 season for the following cities: Charlotte, North Carolina; Detroit, Michigan; Los Angeles, California; Omaha, Nebraska; Salt Lake City, Utah; Denver, Colorado; Kansas City, Missouri; Milwaukee, Wisconsin; St. Louis, Missouri; San Francisco, California. There were also proposed and recommended by the local committees of the exhibitors and distributors and were awaiting acceptance by the home offices of the distributors in New York City, uni- [fol. 47] form zoning and protection plans for the 1930-31 season for the following cities: Albany, New York; Cincinnati, Ohio; New Orleans, Louisiana; Philadelphia, Pennsylvania; Buffalo, New York; Memphis, Tennessee; Oklahoma City, Oklahoma; and Washington, D. C. There were also under consideration for the 1930-31 season, by local committees, uniform zoning and protection plans for the following cities: Atlanta, Georgia; Chicago, Illinois, Des Moines, Iowa; Minneapolis and St. Paul, Minnesota; New York, New York; Portland, Oregon; Boston, Massachusetts; Cleveland, Ohio; Indianapolis, Indiana; New Haven, Connecticut; Pittsburgh, Pennsylvania; and Seattle, Washington.

117. In 1932 the United States District Court for the District of Nebraska[14] held that the Uniform Zoning and Protection Plan for the Omaha Distribution Territory was an agreement between distributors which restrained trade in violation of the Sherman Act. After the illegality of these uniform zoning and protection plans became apparent in 1932, the distributors refrained from employing any express agreements with each other with respect to uniform protection and zoning.

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[14] *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. (2d) 538.

118. Another concerted effort was made to establish uniform zoning and protection plans under the code of the motion picture industry adopted pursuant to the National Industrial Recovery Act in December 1933. From that time until May 1935, when that Act was invalidated by the Supreme Court, efforts were made by local clearance and zoning committees throughout the country to establish uni- [fol. 48] form clearance and zoning plans. (It was at about this time that the term "clearance" was substituted in the industry for the term "protection" which had been used prior thereto.) Such a plan was actually arrived at in Los Angeles, California, and a modification of that plan is still in effect in that territory. Although such plans were under consideration in numerous other territories, the invalidation of the National Industrial Recovery Act prevented those plans from going into effect. Since May 1935, the industry has made no open effort to establish uniform clearance and zoning by express agreements between distributors.

119. Notwithstanding the disavowal by distributors of agreements between themselves with respect to uniform clearance and zoning schedules, such schedules are actually in effect in every exhibition territory in the United States. Many of these schedules were arrived at by agreement before 1932 and have been carried forward since that time as a matter of tacit understanding and custom. Other uniform clearance and zoning schedules have developed as a result of pressure uniformly exerted by the dominant exhibitor in a zone upon all of the distributors. The dominant circuits in every exhibition area, whether they be affiliated or unaffiliated, in purchasing product generally request and secure the same runs and the same protections from all distributors with whom they deal and such terms are incorporated in express agreements with each such distributor. The result is a uniform system or plan of clearance which is embodied in a series of similar clearance schedules agreed to by the dominant exhibitors with each distributor [fol. 49] rather than a single schedule.

120. Each distributor knows the run and clearance granted by every other distributor licensing the same theatres and knows that the effect of such uniformity is to

freeze the playing positions and admission prices of all theatres in an area where such uniform schedules prevail.

D. *Long Term Franchises*

121. Generally, distributors enter into license agreements with exhibitors every season and most license agreements cover only a single season's output of pictures. In their dealings with circuits, however, both affiliated and unaffiliated, the distributors engage in the practice of entering into long-term franchises. These franchises are for periods varying from two years to twenty years, and they cover the exhibition of pictures released by a distributor during their term in the theatres of the circuits with which they are made. The amount of film rentals involved in a single franchise has sometimes exceeded two million dollars and a single franchise has sometimes covered the terms of exhibition in more than five hundred theatres in widely separated localities.

122. Long-term franchises are generally advantageous to the circuits with which they are made. By virtue of the fact that the circuits have large buying power and pay to the distributors large sums of money, these franchises often discriminate against independent theatres whose buying power is small. These franchises generally give to the circuit theatres a selective choice of pictures and, regardless [fol. 50] of changes in circumstances that may take place during the term of such a franchise, the circuit is permitted to tie up all the pictures or a substantial portion of the pictures released by the distributor while it is obligated to take only a selection of said pictures. By establishing the runs and protections with respect to all the theatres in the circuit, these franchises deny to other theatres, during their term, the opportunity to bid for or to license the runs of pictures covered by such a franchise in competition with the circuit theatres. Another effect of these long-term franchises is that they restrict the market for films independently produced and released. Many of these franchises do not contain all the terms and conditions pursuant to which pictures are licensed, but are simply agreements to enter into binding licenses at some future time.

123. Franchises generally provide for the exhibition of pictures in all of the theatres operated by the circuit involved, and some of them have even provided that additional theatres acquired by the circuit during the term of the franchise are to be included within its terms. Some of these franchises also provide that where a circuit has not exhibited all the pictures licensed in certain theatres, it may make up for this deficiency by exhibiting in other theatres more pictures than have been licensed for exhibition in such theatres. This practice is known as overage and underage. These franchises also confer advantages upon certain theatres by providing for reductions in film rentals where vaudeville performances are given and where double feature programs are used and also by providing that in certain [fol. 51] situations advertising costs are to be paid by the distributor or shared between the distributor and the exhibitor. Rental terms in such franchises are frequently calculated in accordance with formulae which are based upon the net profits to the exhibitor, rather than gross receipts, from the exhibition of the feature picture involved and are in effect profit sharing agreements.

E. *Circuit Discrimination*

124. In licensing films to an exhibitor who owns or controls a number of theatres, such as a large circuit, the terms with respect to all of the circuit theatres are generally negotiated at the same time regardless of how many theatres there are in the circuit or where they are located. The exhibitor in negotiating such terms attempts to secure the most favorable terms for all of his theatres and in so doing frequently conditions the granting of certain terms in one theatre situation which he controls upon the granting of certain terms in another unrelated theatre situation which he also controls. In negotiating terms for such a circuit, the distributor sometimes conditions the use of its films in certain competitive situations where the circuit needs the distributor's films upon the acceptance by the circuit of films which the circuit does not need in other competitive situations. The result is that an independent exhibitor, operating a single theatre in competition with a circuit is unable to compete for the privilege of licensing the distribu-

tor's films on the basis of what his theatre can offer as against the circuit theatre in immediate competition with him, but is frequently excluded from any consideration as [fol. 52] a prior-run outlet for the distributor's films because of competitive conditions existing in an entirely different exhibition situation, over which the independent exhibitor has no control.

125. In licensing films to an affiliated circuit, the same procedure is followed as with respect to any other circuit except that the factor of affiliation introduces into the negotiations an inducement to discriminate in favor of affiliated theatres at the expense of unaffiliated theatres. A producer-exhibitor defendant, in negotiating for the licensing of films released by it for exhibition in theatres owned and controlled by another producer-exhibitor defendant, must take into consideration the terms demanded by the other producer-exhibitor in licensing its films for exhibition in theatres owned or controlled by such first producer-exhibitor. The granting of certain terms and privileges with respect to the exhibition of one producer-exhibitor defendant's films in another producer-exhibitor defendant's circuit is necessarily conditioned upon the granting of similar terms and privileges by the latter with respect to the exhibitions of its films in the circuit of the former.

F. *Control Over Exhibition Exercised by First-Run Exhibitors*

126. A number of prints of each feature, depending on the number of theatres to be served, are delivered to each exchange prior to national release date and delivered by the exchange to the various theatres which have licensed the film in accordance with the priority established by their contracts and returned to the exchange after each use. The [fol. 53] picture is privately screened on or shortly after arrival for the benefit of the trade and particularly the exhibitors which hold first-run contracts. The contracts held by such exhibitors generally give them wide selective privileges which enable them to reject a substantial number of the features covered by their contracts after the picture has been screened for them. If the feature is accepted for

first-run exhibition, it is exhibited in a first-run theatre and subsequently in the remaining theatres in accordance with their respective playing positions, established by the run designated in their respective license contracts. If it is rejected it is offered for license to other exhibitors operating first-run theatres or successively offered for license to exhibitors operating subsequent-run theatres in the order of the runs on which they play. As the first-run exhibitor not only has the opportunity to screen the picture but also frequently obtains reports on the box-office performances of the picture in key cities before making his selection, the pictures rejected are almost invariably inferior as box-office attractions to those selected.

127. Exhibitors holding first-run license contracts for the pictures released by one or more of the defendant distributors ordinarily charge the highest admission prices in the towns or cities where such first-run theatres are located as their programs consist of selected features comprising the highest quality of available motion picture entertainment.

128. The first-run exhibitor is also usually required to charge the highest admission price as a condition of securing a given clearance over subsequent-run theatres. Subse- [fol. 54] quent-run theatres could not normally play a picture so profitably at the same admission price as the first-run in view of the fact that they must play it at a substantially later date after the capacity of the picture to attract an audience from the particular clearance zone has been partially exhausted by the first run. The same considerations generally compel a difference in admission prices corresponding to a difference in run and clearance for the same picture in all subsequent-run theatres. The result is that the entire admission price, run and clearance structure of the theatres in a given town or city is subject to run and clearance terms fixed in license agreements between the major distributors and first-run exhibitors, and the availability to subsequent-run exhibitors of the most profitable features is determined by the manner in which the first-run exhibitor exercises his selective privilege. In recognition of this fact the producer-exhibitor defendants have uniformly refrained from operating subsequent-run

theatres in towns or cities where they do not operate first-run theatres.

G. *Local Exhibition Monopolies*

129. In the course of integrating the production and exhibition branches of the industry as heretofore recited, the producer-exhibitor defendants have acquired control of a substantial number of local exhibition monopolies. In many instances they acquired circuits of theatres which had already established such a monopoly prior to affiliation and have maintained such monopolies. In either case these monopolies consist of receiving a substantial majority of the total theatre admission revenue in large communities, [fol. 55] generally cities of more than one hundred thousand population, and paying a substantial majority of the total film rentals received by distributors from all theatres located in such a community. In such communities competing unaffiliated exhibitors operate only at the sufferance of the producer-exhibitor defendants and they can offer no substantial competition to affiliated exhibitors either with respect to the terms on which films are licensed or the terms on which they are exhibited to the public.

130. Such monopolies have been established and maintained by acquiring control of the first-run theatres or the theatres operating on the first and other early runs. By control of first-run theatres alone, affiliated exhibitors have been able to secure as much as two thirds of the total theatre admissions paid in cities as large as 250,000. This result is accomplished, in part, by maintaining a long clearance and substantial admission price differential between the first and subsequent runs. In larger cities, affiliated exhibitors have found it necessary to control the theatres operating in the first two or three runs in order to secure a similar proportion of the total available film revenue, but, in either case, clearance and runs have been so adjusted that few unaffiliated theatres, if any, have an opportunity to play a first-class picture until all or nearly all of the affiliated theatres have exhibited it. A similar pattern occurs with respect to affiliated exhibitor control over first and subsequent-run theatres and the distribution of total film revenue in a substantial majority of the cities of the United States

[fol. 56] with a population of 100,000 or more. In acquiring such film revenue monopolies the defendants have not generally found it necessary to acquire control of all the theatres most suitable for first and early run exhibition in such cities. By this control of the licensing of all first-class features they have been able to exclude such theatres from first or early run operation while in unaffiliated hands.

131. More than 80% of all the metropolitan first-run theatres[15] are affiliated theatres. More than 95% of the features exhibited in metropolitan first-run theatres are released by the distributor defendants. In the following metropolitan cities all of the first-run theatres are affiliated theatres:

Boston, Mass.
New Haven, Conn.
Albany, N. Y.
Brooklyn, N. Y.
Newark, N. J.
Philadelphia, Pa.
Washington, D. C.
Charlotte, N. C.
Memphis, Tenn.
New Orleans, La.
Houston, Texas
Dallas, Texas
Oklahoma City, Okla.
Kansas City, Mo.
Cincinnati, Ohio
Cleveland, Ohio
Chigago, Ill.
[fol. 57] Milwaukee, Wis.
Des Moines, Iowa
Minneapolis, Minn.
St. Paul, Minn.
Omaha, Nebr.
Salt Lake City, Utah

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[15] For definition of a metropolitan theatre see Paragraph 17 (d).

132. In only 4 [16] of the 92 cities of the United States with populations of 100,000 and over are there no affiliated theatres. In 73 of the remaining 88, the producer-exhibitors operate enough first-run theatres in each to receive a substantial majority of the total theatre admissions paid in each of these cities. The five producer-exhibitors also own or operate one or more theatres in 200 of the 283 cities of population between 25,000 and 100,000.

VI. Interstate Commerce

133. The business of producing motion pictures embraces the photographing of scenes on reels of celluloid film, said scenes having been prepared in advance by the assemblage, at the studios or upon location, of the necessary directors, actors, actresses, extra players, and other persons and facilities necessary to complete the scenes to be photographed. The personnel necessary to the production of a motion picture is usually assembled at the studios in California, where most of the pictures are made, and costumes and raw materials entering into the making of pictures, in many instances, are manufactured outside the State of [fol. 58] California and shipped across state lines to the studios for use in production.

134. Approximately two billion feet of negative stock celluloid film are used in the production of motion pictures annually, practically all of which is manufactured at plants located in the states of New York and New Jersey. Approximately 90% of the raw negative stock is shipped across state lines to the studios in California to be utilized in the production of motion pictures.

135. After the scenes going to make up a motion picture have been photographed, the film is developed, cut, fixed, edited and arranged at the studios in California. Then the negatives are shipped to laboratories located principally in California, New York and New Jersey, where the required number of positive prints are made (usually between 50 and 250) to fulfill the contractual requirements for the picture in question. The positive prints so prepared are

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[16] Tulsa, Oklahoma; Fall River, Massachusetts; Tacoma, Washington; and Fort Wayne, Indiana.

the motion picture films which are projected in motion picture theatres, in most instances, after having been shipped across state lines to the film exchanges maintained in the various exchange cities throughout the country.

136. In the spring of each year, producers of motion pictures announce their prospective programs for the coming exhibition season. These programs describe the pictures to be produced, so far as known, giving their titles, the names of the stars and other featured players, the directors, and such other pertinent material as may be available. Plans are then made for the production and release of the photo- [fol. 59] plays upon the program, at approximately regular intervals throughout the exhibition season, which begins on September 1 of each year.

137. When programs have been arranged and fixed, the distributors, through their salesmen, who work out of the exchanges, solicit exhibitors to enter into license agreements covering exhibition of photoplays for the coming season. Each photoplay is copyrighted under the Copyright Laws of the United States, and the solicited license agreements as signed by exhibitors are, by the terms thereof, usually transmitted to the principal office of the distributor, usually in New York, where such agreements are either approved or rejected.

138. The positive prints, when prepared at the laboratories, are packed in tin boxes which, in turn, are placed in wooden cases, and said positive films as completed, are from time to time shipped and transported from the laboratories where completed, across state lines to the various film exchanges throughout the country where they are utilized.

139. Upon receipt of the motion picture films by an exchange, they are delivered to the various exhibitors in the exchange territory, who, under their license agreements with distributors, have the first or prior right to exhibit the respective films, and are then returned to the exchange and transported to the exhibitors having the next succeeding right to exhibit, and so on until all exhibitors who are to exhibit the photoplays have been served, or transported directly from a prior-run theatre to a subsequent-run theatre. Many shipments of films from exchange to exhibi- [fol. 60] tor, and from exhibitor to exchange, cross state

lines. When the films are worn out, they are shipped or returned to laboratories for scrapping; which shipments, as a rule, cross state lines, the final destination usually being New York City.

140. Thus, in the course of producing, distributing and exhibiting motion pictures there is a constant, continuous stream of trade and commerce between the states, in and between the territories and the states of the United States, consisting of the solicitation and the making of contracts for the future delivery over periods of time of films to be produced and delivered as hereinbefore described; the assemblage of personnel, property and material at the studios or upon location for the production of pictures, the transportation of negative films from the studios to the laboratories where positive prints of motion picture films are prepared, and from there shipped to film exchanges throughout the United States; the continuous distribution of said films from the exchanges to and from motion picture theatres located in the areas served by the respective exchanges; the interchange of said films between each exchange and other exchanges of the same distributor located in other states of the United States or in the territories thereof and, finally, the shipment of said films from said exchanges throughout the United States to points within the State of New York or elsewhere for scrapping.

141. The activities of each branch of the motion picture industry are either in or directly affect trade and commerce among the several states.

[fol. 61] VII. Offenses Charged

A. *Conspiracies to unreasonably restrain and monopolize the production, distribution and exhibition of motion pictures participated in by all of the distributor defendants*

142. All of the distributor defendants, each well knowing all the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain, and pursuant to said combinations and conspiracies have in fact unreasonably restrained, trade and commerce in the production, distribution

and exhibition of motion pictures in the United States, and have attempted to and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known and hereinafter referred to as the "Sherman Act," in the following manner:

143. By concertedly aiding and assisting in the loaning and exchanging of production personnel under contract to each major producer, and costly production equipment owned by each major producer, to and with other major producers on uniform, non-competitive terms.

144. By concertedly aiding and assisting the major producers to exclude independent producers from access to production personnel under contract to each major producer, and costly production equipment owned by each [fol. 62] major producer, on the same terms on which they are made available to major producers.

145. By concertedly fixing license terms in contracts made before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown.

146. By concertedly fixing the run, clearance and minimum admission price terms on which an exhibitor may play features in license agreements covering periods of a year or more.

147. By concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films.

148. By concertedly conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in another theatre or group of theatres, which has no relationship to the first theatre or group of theatres other than common ownership or control or a common film buying agent.

149. By concertedly discriminating with respect to the license terms granted to theaters in large circuits because such theatres are a part of a circuit. The means of such discrimination most frequently employed with respect to such theatres are the following:

(a) *Run*

In areas where such theatres compete with independent theatres, the defendant distributors have offered to license feature pictures distributed by them to said theatres on a run ahead of said independent theatres, and only if said cir- [fol. 63] cuit theatres decline to license said product on said prior run is that run offered to competing independent exhibitors. Said priority of run has ordinarily been continued from season to season, that is to say, the said defendants reserve a prior run for circuit theatres, and refuse to license feature pictures distributed by them on said prior run to independent exhibitors, even though said independent exhibitors request the prior run from one or more of the defendants before said defendants have agreed in writing to license their feature pictures for an approaching motion picture season on said prior run to competing circuit theatres. Feature pictures distributed by the defendants have been licensed to circuit theatres on prior runs, although competing independent theatres, by virtue of their location, seating capacity, equipment, appearance, and the amount of other product they already have under contract, are as suitable or more suitable than competing circuit theatres to exhibit the feature pictures requested on a prior run, and although they may offer and be in a position to pay a higher film rental for feature pictures than the competing circuit theatres. As a result, independent exhibitors operating in competition with circuit theatres have been and are systematically excluded from the opportunity to procure preferred runs of feature pictures distributed by the defendants in the localities in which circuit theatres operate. In many instances the defendant distributors have refused to license an independent exhibitor on any run at all in order to protect a circuit theatre from competition, regardless of how much clearance in favor of the circuit [fol. 64] theatre the independent exhibitor is willing to submit to and regardless of what admission price he will charge or what rental he will pay.

(b) *Delivering prints*

In delivering prints for exhibition by independent exhibitors competing on the same run in the same exchange

territory with such circuit theatre, the distributor defendants ordinarily serve the circuit theatre first if there is an insufficient number of prints available in the exchange to serve all theatres operating on the same run simultaneously, and thus give circuit theatres prior playing dates not provided for in their exhibition contracts.

(c) *Clearance*

The defendant distributors have granted such circuit theatres arbitrary and unreasonable clearance over competing independent theatres. In many instances such defendants have granted clearance to circuit theatres which serves no legitimate interest of the distributor. Such clearance is granted by the defendants solely at the insistence of said circuit theatres and for the purpose of aiding said circuit theatres to suppress the competition offered by independent theatres rather than to secure the most revenue for the distributor. As a result, independent theatres, in many instances, are unable to exhibit feature pictures until their novelty and freshness have worn off and their box office value has been seriously diminished, solely because earlier exhibition in the independent theatres would decrease the profits of a circuit exhibitor.

[fol. 65] (d) *Minimum admission prices*

In many instances each distributor defendant has agreed with such circuit theatres to require independent theatres exhibiting their feature pictures on a run subsequent to that of the circuit theatre, to charge a minimum admission price for such exhibition so high that such subsequent run independent theatres cannot operate successfully.

(e) *Prohibition of double features on subsequent runs*

In many instances each defendant distributor has agreed with such circuit theatres to prevent independent theatres exhibiting their feature pictures on a run subsequent to that at a circuit theatre from exhibiting, as part of a double feature program, feature pictures which have been exhibited at the circuit theatre.

(f) *Selectivity of deals*

In contracting with such a circuit of theatres, each defendant distributor ordinarily gives it the right to select a certain number of the feature pictures released by it each season for exhibition at the circuit's theatres. In contracting with independent theatres, however, each such defendant has ordinarily refused to license any of its product unless the independent exhibitor contracts for all of the feature pictures released by it. Or, in the event that independent exhibitors are granted selective privileges in licensing pictures, the selection granted to them has ordinarily not been as great as that granted to competing circuit theatres.

(g) *Designation of play dates*

In many instances each distributor defendant, in licensing feature pictures to independent exhibitors, requires that [fol. 66] certain pictures be exhibited upon designated days or reserve the privilege of designating the days on which a certain number of the feature pictures licensed should be exhibited. Ordinarily, each such defendant designates that such feature pictures be played on the most desirable days in the week from the standpoint of attracting patronage, that is, Saturdays, Sundays or holidays, and ordinarily the feature pictures which are designated to be played on such preferred days are ones which the exhibitor has licensed on percentage terms. The independent exhibitor is forced to accept such designation of play dates in order to obtain the product necessary for the operation of his theatre. Although each distributor may require such circuit theatres to play certain pictures on designated days, the number of pictures designated by each distributor to be so played by circuit theatres is usually not as great as the number designated to be so played by independent exhibitors.

(h) *Forcing of short subjects, news reels, trailers, serials, reissues, westerns and foreigns*

In many instances each defendant distributor has refused to license its feature pictures to independent exhibitors unless they also agree to license and pay for the short subjects, news reels, trailers, serials, reissues, westerns and foreigns

released by that defendant, even though the independnt exhibitor does not wish to license such additional films and has no need for them. This practice is usually not enforced against such circuit theatres.

[fol. 67] (i) *Film Rentals*

In many instances, each distributor defendant has required independent theatres to pay higher film rentals for the exhibition of feature pictures on a given run than it requires of such circuit theatres, and in many instances independent exhibitors are required to pay as much or more for the exhibition of feature pictures on a subsequent run as circuit theatres pay for the exhibition of the same feature pictures on a prior run. Moreover, independent exhibitors are required to play a greater number of pictures on percentage terms than are such circuit theatres and the latter theatres are permitted to pay flat rentals for many pictures played by independent exhibitors on a percentage basis. Independent exhibitors are also required to play more percentage pictures with a minimum guaranteed film rental than are such circuit theatres.

(j) *Advertising Allowances*

In many instances each distributor defendant, in licensing feature pictures to such a circuit of theatres, agrees to pay the cost of advertising such pictures or share it with the circuit. The defendants seldom, if ever, agree with independent exhibitors to pay for or share advertising costs.

(k) *Score charges*

Independent exhibitors are required by each defendant distributor to pay score charges[17] on practically every pic-

[17] Originally, sound came from a disc or record, the playing of which was synchronized with the picture. A charge was made for the use of the disc, which came to be called a "score charge." As sound developed, the sound track was superimposed on the film and the disc was discarded. Nevertheless, distributors continued to require the payment of score charges which in reality amount to additional film rental.

[fol. 68] tures which they exhibit, while such circuit theatres seldom, if ever, are required to pay score charges on more than half of the pictures which they play.

(l) *Optional contracts*

In many instances each defendant distributor gives such circuit theatres the privilege or option of playing certain specified features without assuming any binding obligation to do so. This is in reality a selective contract which gives such circuit theatres wide choice in regard to the pictures which they exhibit. Such benefits are seldom, if ever, extended to independent exhibitors.

(m) *Contract modifications*

In many instances each defendant distributor permits material changes and alterations in its contracts with such circuit theatres. Seldom, if ever, are such modifications made by the defendant distributors in their contracts with independent exhibitors, and in the cases where they are made, the modifications are much more limited than when the contract is with such a circuit of theatres. Among the types of modifications made in contracts with such circuit theatres are the following:

1. Reduction of film rentals where box-office receipts upon the exhibition of pictures covered by the contract have been disappointing.

2. Reduction in film rentals where pictures covered by the contract are double-featured.

[fol. 69] 3. Reduction in film rentals where pictures covered by the contract are shown with vaudeville.

4. Reduction in film rentals where pictures covered by the contract are shown in connection with a premium give-away, by which attendance at the theatre is encouraged.

5. Changing pictures covered by a contract specifying percentage of box-office revenue as rental, to a flat rental, so-called, which means a fixed rental designated in terms of dollars and cents.

6. Elimination of pictures covered by contracts by repeating or extending the playing time of other pictures covered by the same contracts.

7. Transfer of pictures under contract for exhibition at one circuit theatre to another theatre operated by the same circuit.

8. Cancellation of some of the pictures covered by a contract when other pictures are more successful at the box office than the distributor and circuit theatre have anticipated.

(n) *Overage and underage*

In many instances each defendant distributor permits such a circuit of theatres to play fewer pictures in one of its theatres than the contract requires, and to charge the deficit thus created against pictures played in another one of its theatres in excess of the commitment of such theatre. This privilege is seldom, if ever, extended to independent exhibitors.

(o) *Move-overs*

In many instances such a circuit of theatres is permitted by each of the defendant distributors to move a picture from one of its theatres where its exhibition has been com- [fol. 70] pleted to another theatre operated by the same circuit for a continued run or exhibition. This practice, which is generally confined to metropolitan areas, reduces the box-office value of a picture when it reaches subsequent-run exhibitors. This privilege is seldom, if ever, extended to independent exhibitors.

(p) *Overbuying*

In many instances such a circuit of theatres is knowingly permitted by the defendants to contract for the exhibition in certain theatres operated by it of more films than such theatres can profitably exhibit for the purpose of withholding such films from competing independent exhibitors who need them in order to operate their theatres. Many pictures so licensed by such circuit theatres are never exhibited by them because of their lack of screen-time to play them, and yet they are released to competing independent exhibitors, if at all, only after the elapse of such a length of time after their release that their exhibition value has been substantially diminished. In other cases, the circuit theatres actu-

ally exhibit all of the pictures licensed by them by following a policy of making a greater number of weekly program changes than are necessary to meet the entertainment requirements of their patrons.

B. *Conspiracies to unreasonably restrain and monopolize the exhibition of motion pictures participated in by the producer-exhibitor defendants*

150. All of the producer-exhibitor defendants, each well knowing all of the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain and monopolize and [fol. 71] pursuant to said combinations and conspiracies have in fact unreasonably restrained and monopolized, trade and commerce in the exhibition of motion pictures in the United States, in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

151. By concertedly conditioning the licensing of films distributed by one producer-exhibitor defendant in theatres operated by another such defendant upon the licensing of films distributed by the latter defendant in the theatres operated by the former defendant.

152. By concertedly excluding independently produced films from affiliated theatres.

153. By concertedly excluding unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where affiliated theatres are located.

154. By concertedly excluding unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where such affiliated theatres are located.

155. By concertedly using the first and early-run affiliated theatres to control the film supply, run, clearance and admission prices of operators of competing unaffiliated theatres in the cities and towns in which affiliated theatres are located.

156. By concertedly coercing and intimidating unaffiliated exhibitors located in towns where there are no affiliated theatres to license their films upon arbitrary terms by expressed or implied threats to build or acquire a competing

theatre and use it to destroy the business of the unaffiliated exhibitor.

[fol. 72] 157. By concertedly coercing and intimidating exhibitors located in towns where affiliated theatres are located or where an affiliated exhibitor desires to locate into relinquishing control of his theatre or a share of the profits thereof to the affiliated exhibitor by expressed or implied threats to deprive him of access to films necessary to the successful operation of his theatre or to so limit the terms and conditions on which he licenses such films that they may no longer be profitably exhibited by him.

158. By pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more producer-exhibitor defendants, located in the same competitive area and frequently operating on the same run, which would operate in competition with each other except for such pooling or profit sharing agreements.

159. By agreeing to divide the available films among affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area, without competitive negotiations, in situations where such theatres would otherwise compete with each other for such films.

160. By entering into joint arrangements with respect to a single theatre, whereby the film buying control or proceeds from the operation thereof is divided between two or more producer-exhibitor defendants.

161. By concertedly refraining from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres, except under agreements preventing competition such as those noted in paragraphs 158, 159 and 160 above.

[fol. 73] 162. By concertedly effecting a division of the territory of the entire United States between them for theatre operating purposes.

163. By concertedly acquiring and maintaining a monopoly of the business of exhibiting motion pictures in approximately 80% of the cities of the United States with populations of more than 100,000.[18]

164. By concertedly acquiring and maintaining a monopoly of the business of exhibiting motion pictures in all of the

cities of the United States with populations of more than 1,000,000.[18]

165. By concertedly acquiring and maintaining a monopoly of the business of exhibiting motion pictures in each of the following cities of the United States with populations of more than 100,000[18] for theatres affiliated with the producer-exhibitor defendants respectively named thereafter:

City	Population rank	Defendants
New York, N. Y.	1	Loew's, Paramount, RKO, Warner
Chicago, Ill.	2	Paramount, RKO, Warner
Philadelphia, Pa.	3	Fox, Paramount, Warner
Detroit, Mich.	4	Fox, Paramount
Los Angeles, Calif.	5	Fox, Loew's, Paramount, RKO, Warner
Cleveland, Ohio	6	Loew's, RKO, Warner
Boston, Mass.	9	Loew's, Paramount, RKO
Pittsburgh, Pa.	10	Loew's, Warner
Washington, D. C.	11	Loew's, RKO, Warner
San Francisco, Calif.	12	Fox, Loew's, Paramount, RKO
Milwaukee, Wis.	13	Fox, Warner
Buffalo, N. Y.	14	Loew's, Paramount
New Orleans, La.	15	Loew's, Paramount, RKO
Minneapolis, Minn.	16	Paramount, RKO
Cincinnati, Ohio	17	RKO
Newark, N. J.	18	Loew's, Paramount, RKO, Warner
Kansas City, Mo.	19	Fox, Loew's, Paramount
Houston, Tex.	21	Loew's, Paramount
Seattle, Wash.	22	Fox
Rochester, N. Y.	23	Loew's, Paramount, RKO
[fol. 74]		
Denver, Colo.	25	Fox, Loew's, RKO
Portland, Oreg.	26	Fox
Columbus, Ohio	27	Loew's, RKO
Oakland, Calif.	28	Fox
Atlanta, Ga.	29	Loew's, Paramount
Jersey City, N. J.	30	Loew's, RKO, Warner
Dallas, Tex.	31	Paramount
Memphis, Tenn.	32	Loew's, Paramount, Warner
St. Paul, Minn.	33	Paramount, RKO
Birmingham, Ala.	35	Paramount
San Antonio, Tex.	37	Paramount, Warner
Omaha, Nebr.	39	Paramount, RKO
Dayton, Ohio	40	Loew's, RKO
Syracuse, N. Y.	41	Loew's, RKO, Warner
Oklahoma City, Okla.	42	Paramount, Warner
San Diego, Calif.	43	Fox
Worcester, Mass.	44	Loew's, Paramount, Warner
Richmond, Va.	45	Loew's
Fort Worth, Tex.	46	Paramount
Jacksonville, Fla.	47	Paramount
Miami, Fla.	48	Paramount
Youngstown, Ohio	49	Warner

[18] All population figures are taken from 1940 census.

City	Population rank	Defendants
Hartford, Conn.	51	Loew's, Paramount; Warner
Grand Rapids, Mich.	52	Paramount, RKO
Long Beach, Calif.	53	Fox
New Haven, Conn.	54	Loew's, Paramount, Warner
Des Moines, Iowa	55	Paramount, RKO
Flint, Mich.	56	Paramount, RKO
Salt Lake City, Utah	57	Paramount
Springfield, Mass.	58	Loew's, Paramount, Warner
Bridgeport, Conn.	59	Loew's, Warner
Norfolk, Va.	60	Loew's
Yonkers, N. Y.	61	Loew's, Paramount, RKO
Scranton, Pa.	63	Paramount
Paterson, N. J.	64	Paramount, Warner
Albany, N. Y.	65	RKO, Warner
Chattanooga, Tenn.	66	Paramount
Trenton, N. J.	67	RKO
Spokane, Wash.	68	Fox
Camden, N. J.	71	Warner
Erie, Pa.	72	Warner
Wichita, Kans.	74	Fox
Knoxville, Tenn.	75	Paramount
Wilmington, Del.	76	Loew's, Warner
Reading, Pa.	79	Loew's, Warner
Tampa, Fla.	83	Paramount
Sacramento, Calif.	85	Fox
Peoria, Ill.	86	Paramount
South Bend, Ind.	88	Paramount
Lowell, Mass.	89	Paramount, RKO
Utica, N. Y.	90	Warner
Charlotte, N. C.	91	Paramount
Duluth, Minn.	92	Paramount

[fol. 75] C. *Conspiracies to unreasonably restrain and monopolize the production of motion pictures participated in by the producer defendants*

166. All of the producer defendants, each well knowing all of the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain and monopolize and pursuant to said combinations and conspiracies have in fact unreasonably restrained, trade and commerce in the production of motion pictures in the United States, and have attempted to and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

167. By concertedly placing under contract most of the valuable stars, featured players, directors, technicians and others who have gained fame, prestige, renown, artistic,

technical or other great value in the production branch of the industry.

168. By concertedly loaning and exchanging production personnel under contract to each major producer, and costly production equipment owned by each major producer, to and with other major producers on uniform, non-competitive terms.

169. By concertedly excluding independent producers from access to production personnel under contract to each major producer, and costly production equipment owned by each major producer, on the same terms on which they are made available to major producers.

[fol. 76] D. *Combinations of which each producer-exhibitor defendant is a member which are illegal per se*

170. Each of the combinations of parent and subsidiary corporations which respectively form Fox, Loew's, Paramount, RKO and Warner constitutes a separate combination and monopoly in restraint of trade, which in and of itself has violated Sections 1 and 2 of the Sherman Act in the following manner:

171. By preventing independent producers from competing with such a combination in the production of films.

172. By preventing independent distributors from competing with such a combination in the distribution of films.

173. By preventing unaffiliated exhibitors from competing with such a combination in the operation of theatres in cities and towns where theatres operated by it are located.

174. By acquiring and maintaining a monopoly of the business of exhibiting motion pictures in areas serving a substantial percentage of the total population of the United States.

175. By coercing and intimidating unaffiliated exhibitors located in towns where such a combination operates no theatres to license its films upon arbitrary terms by expressed or implied threats to build or acquire a competing theatre and use it to destroy the business of such unaffiliated exhibitors.

176. By coercing and intimidating unaffiliated exhibitors located in towns where such a combination operates theatres or where it desires to operate theatres, into relinquishing

[fol. 77] control of their theatres or a share of the profits thereof, to it, by expressed or implied threats to deprive them of access to its films or to so limit the terms and conditions on which they license such films that they may no longer be profitably exhibited by them.

177. By conditioning the licensing of films distributed by such a combination in theatres operated by another such combination, upon the licensing of films distributed by the latter combination in theatres operated by the former combination.

E. *Illegal contracts between each distributor defendant and circuit theatres*

178. Each defendant distributor, well knowing all the matters and things hereinbefore alleged, for many years last past, has contracted with various theatre circuits throughout the United States, including the affiliated circuits hereinbefore mentioned, to restrain and, pursuant to such contracts, has in fact unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures among the several States of the United States, in violation of Section 1 of the Sherman Act, by entering into licensing agreements with said circuits of theatres which contain provisions calculated to impose on independent exhibitors in competition with such circuit theatres, one or more of the discriminatory restrictions referred to in the lettered subparagraphs of paragraph 149, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants.

[fol. 78] F. *Illegal coercion by each producer-exhibitor defendant*

179. Each producer-exhibitor defendant, well knowing all the matters and things hereinbefore alleged, for many years last past, has violated Section 2 of the Sherman Act by using the monopolistic buying power of its circuit of theatres to compel each of the defendant distributors and other distributors of films to enter into licensing agreements with its circuit on terms which prevent unaffiliated theatres from in fact competing with its circuit theatres, either with respect

to the terms on which said unaffiliated theatres license films or the terms on which they exhibit films to the public, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants.

G. *Illegal contracts made by each distributor defendant with exhibitors generally*

180. Each distributor defendant, well knowing all the matters and things hereinbefore alleged, for many years last past has made divers contracts with exhibitors generally throughout the United States to unreasonably restrain and, pursuant to such license contracts, has in fact unreasonably restrained trade and commerce in the distribution, production and exhibition of motion pictures in the United States in violation of Section 1 of the Sherman Act, in the following manner, regardless of whether such license contracts were made pursuant to any concerted action, combination or conspiracy between two or more defendants:

[fol. 79] 181. By fixing license terms in contracts made before the exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown.

182. By fixing the run, clearance and minimum admission price terms in license agreements covering large groups of pictures of widely varying quality released over periods of a year or more.

183. By conditioning the licensing of one film or group of films upon the licensing of another film or group of films.

184. By conditioning the licensing of films in one theatre, or group of theatres, upon the licensing of films in another theatre, or group of theatres, which has no relationship to the first theatre, or group of theatres other than common ownership or control or a common film buying agent.

185. By making clearance agreements which are calculated to suppress competition between exhibitors rather than to protect the distributor's revenue.

186. By refusing to license a run on any terms, for the purpose of protecting an exhibitor from competition rather than to protect the distributor's revenue.

187. By arbitrarily withholding prints available in an exchange from one exhibitor in order to give another exhibitor a prior playing date not provided for in his licensing agreements.

VIII. Prayer

Wherefore, plaintiff prays:

(1) That the court issue its preliminary injunction restraining the defendants herein, and each of them, from [fol. 80] building, buying, leasing, or otherwise acquiring any additional theatres or any further interest, or interests, in any additional theatres, either directly or indirectly, through the acquisition thereof by subsidiary or associated corporations or otherwise, until the final decree herein or until the further order of this court.

(2) That each of the contracts, combinations, and conspiracies in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

(3) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of the respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in the production, distribution, and exhibition of motion pictures described herein, and from entering into and carrying out, directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

(4) That a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of [fol. 81] whatever general and nation-wide prohibitions of illegal practices may be contained therein.

(5) That the integration of the production and exhibition branches of the industry by the producer-exhibitor defend-

ants herein, and each of them, be declared to be unlawful as an instrumentality of monopoly and restraint upon interstate trade and commerce, and violative of the Sherman Anti-Trust Act.

(6) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures, Inc., Loew's, Incorporated, and Radio-Keith-Orpheum Corporation, and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, either in theatres and theatre holdings or in production and distribution facilities and that they, and each of them, and their respective successors be permanently enjoined from acquiring, directly or indirectly, any other interests in the branch of the industry divested or in any persons, firms, or corporations which are engaged or may engage in that branch of the industry; said divestiture to be accomplished and carried out upon such terms and conditions as the court may deem proper.

(7) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, National Theatre Corporation, Warner Bros. Pictures, Inc., Warner Bros. Circuit Management Corporation, Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Cor-[fols. 82-83] poration and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find have been used by one or more of them to unreasonably restrain trade and commerce in motion pictures in violation of Section 1 of the Sherman Act or to monopolize trade and commerce in motion pictures in violation of Section 2 of the Sherman Act.

(8) That the plaintiff have such other and further relief as the court may deem proper.

(9) That the plaintiff recover its cost herein.

United States of America, John T. Cahill, United States Attorney for the Southern District of New York.

Robert H. Jackson, Attorney General. Thurman Arnold, Assistant Attorney General. James V. Hayes, Robert L. Wright, Robert E. Sher, J. Stephen Doyle, Jr., John F. Clagett, Special Assistants to the Attorney General. James M. Malloy, J. Frank Cunningham, Seymour Simon, Special Attorneys.

Filed: Nov. 14, 1940.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONSOLIDATED ANSWER OF RKO DEFENDANTS TO AMENDED AND SUPPLEMENTAL COMPLAINT

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The defendants, Radio-Keith-Orpheum Corporation,[1] RKO Radio Pictures, Inc., RKO Proctor Corporation and RKO Midwest Corporation (hereinafter sometimes referred to as the answering defendants), by their solicitors, William J. Donovan and William Mallard, answering the Amended and Supplemental Complaint herein, allege as follows:

[fol. 85] 1. Deny so much of (1)[2] as alleges that the answering defendants have violated or are violating, or intend to violate Sections 1 or 2 of the Sherman Anti-Trust Act in the manner alleged in the petition, or in any other

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[1] Radio-Keith-Orpheum Corporation is hereinafter sometimes referred to as "the parent company"; RKO Radio Pictures, Inc., as "the RKO Company engaged in production and distribution"; RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation as "the RKO Companies engaged in exhibition"; and Keith-Albee-Orpheum Corporation as "KAO".

[2] Numbers in parentheses refer to corresponding numbered paragraphs of Amended and Supplemental Complaint.

manner, severally, or either jointly among themselves or with any other person or persons and, except as so denied states that they are without knowledge or information sufficient to form a belief as to each and every allegation therein.

2. Deny each and every allegation of (2).

3. As to (3) and (4), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 86] 4. As to (5a) admit that Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, N. Y., and allege that it owns stock and other securities in corporations which are engaged in the business of producing, distributing or exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries, and, except as so admitted and alleged, deny each and every allegation therein.

Admit the allegations contained in (5b).

As to (5c) admit that Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware and has a place of business at 1270 Sixth Avenue, New York, N. Y., and that Radio-Keith-Orpheum Corporation owns approximately 99% of its common stock and 33% of its preferred stock, and except as so admitted deny the allegations therein, but allege that "KAO" owns stock and other securities in corporations which are engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated corporations.

[fol. 87] As to (5d) and (5e) admit the allegations therein.

5. As to (6), (7), (9), (10) and (11), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 88] 6. As to (15a),[1] deny the accuracy of the defini-

[1] Paragraphs 6 through 8 of this answer are qualified in the same manner as the paragraphs of the Amended and Supplemental Complaint to which they are in answer are qualified by paragraph 14 thereof.

tion therein and allege that the term "producer" as therein defined includes persons, partnerships, associations and corporations which are seldom, if ever, referred to in the industry as producers;

As to (15b) and (15c), deny the accuracy of the definitions therein;

As to (15d), admit the accuracy of the definition therein;

As to (15e), state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (15f) and (15g), admit the accuracy of the definitions therein.

7. As to (16a), admit the accuracy of the definition therein;

[fol. 89] As to (16b) and (16c), allege that some companies that are engaged in the distribution of motion pictures are sometimes referred to in the industry as "major distributors", and that other companies so engaged are sometimes referred to as "independent distributors" and, except as so alleged, state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (16d), admit that the term "state rights distribution" is sometimes used in the industry, but, except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (16e), admit the accuracy of the description therein, except they deny that branch exchanges operated by RKO Radio Pictures, Inc., solicit license agreements, but allege that they solicit applications for license agreements.

As to (16f), admit that the term "franchise" is sometimes used in the industry to describe a license agreement, or series of license agreements entered into as part of the same transaction, for the exhibition by the Licensee of the motion pictures released by the licensor during more than one exhibition season, and, except as so admitted, deny the remaining allegations therein.

As to (16g), deny the accuracy of the definition therein.

8. As to (17a), admit the accuracy of the definition therein;

[fol. 90] As to (17b) and (17c), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

As to (17d), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

As to (17e), deny the accuracy of the definition therein.

As to (17f), admit that a group of theatres which is owned, controlled or managed by the same person, partnership or corporation is sometimes referred to as "a theatre circuit", and except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein;

[fol. 91] As to (17g) and (17i), admit the accuracy of the definitions therein;

As to (17h), deny the accuracy of the definition therein.

As to (17j), admit that the term "release" when used as a verbal noun, is used in the industry as therein defined;

As to (17k) and (17m), admit that terms national release date and pre-release are used in the industry as therein defined;

As to (17-l), deny the accuracy of the definition therein, but allege that a trade showing is the exhibition of a feature at a theatre or projection room for the benefit of the trade generally;

As to (17n), deny the accuracy of the definition therein.

As to (17-o), RKO Radio Pictures, Inc., admits the accuracy of the definition therein; the other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (17p), (17q) and (17r), allege that "first-run" in the first exhibition of a motion picture after national release in a community or area; second-run is the exhibition of a motion picture in such community or area next subsequent to its first-run exhibition, and that subsequent-run is an exhibition of a motion picture in such area or community subsequent to its first-run, but usually after second-run; and, except as so alleged, deny each and every allegation therein;

[fols. 92-103] As to (17s), allege that clearance means the period of time fixed by agreement between an exhibitor

and a distributor prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres, and, except as so alleged, deny the accuracy of the definition therein;

As to (17t), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

9. As to (18) through (55), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 104] 10. As to (56), admit that Radio-Keith-Orpheum Corporation, the corporation therein referred to, was incorporated under the laws of the State of Maryland on October 25, 1928, and that since its incorporation it has been primarily a holding company, i. e., owning stock in subsidiaries that either directly, or through other companies, are engaged in the production, distribution or exhibition of motion pictures. Shortly after its organization it acquired substantially all of the common stock of Keith-Albee-Orpheum Corporation and FBO Productions, Inc. Keith-Albee-Orpheum Corporation owned stock in other corporations that were engaged in operating theatres for the exhibition of vaudeville and motion pictures. Subsidiaries of FBO Productions, Inc., were engaged in producing and distributing motion pictures. Except as so alleged, they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

[fol. 105] 11. As to (57), admit that Keith-Albee-Orpheum Corporation was incorporated on January 28, 1928, under the laws of the State of Delaware, and on, to wit, February 16, 1928, acquired as of January 1, 1928, all the issued and outstanding stock of B. F. Keith Corporation and approximately 90% of the issued and outstanding common stock of Orpheum Circuit, Inc. B. F. Keith Corporation and Orpheum Circuit Inc. owned or operated directly, or owned stock in corporations which owned or operated a number of theatres in various cities in the eastern part, and in the midwestern and western parts, respectively, of the United States, which prior thereto were engaged primarily in the exhibition of vaudeville, either alone

or in conjunction with the exhibition of motion pictures. Except as so alleged, they deny the allegations therein.

12. As to (58), allege that subsequent to its incorporation and in addition to the acquisition of stock in Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., as hereinabove alleged, Radio-Keith-Orpheum Corporation acquired the ownership of stock in other companies which were either directly engaged in the business of showing vaudeville and/or exhibiting motion pictures, or owned stock in corporations engaged therein. Two of such companies were the RKO Proctor Corporation and the RKO Midwest Corporation. The RKO Midwest Corporation or companies subsidiary thereto, owned the fee, held the leasehold or operated theatres in Ohio and Michigan. The RKO Proctor Corporation, or companies subsidiary thereto, owned the fee, held the leasehold or operated theatres in the New York metropolitan district and upstate New York. Except as so alleged, they deny the allegations therein.

13. As to (59), Radio-Keith-Orpheum Corporation and the answering defendants engaged in exhibition admit that they and KAO, or subsidiaries thereof, operate the following number of theatres in the following cities:

[fol. 106] *City*	*No. of Theatres*
Boston	2
Champaign, Ill.	2
Chicago	1
Cincinnati, Ohio	9
Cleveland, Ohio	3
Columbus, Ohio	2
Dayton, Ohio	3
Denver, Colorado	1
Des Moines, Iowa	1
Highland Park, Mich.	1
Kansas City, Mo.	1
Los Angeles, Cal.	1
Lowell, Mass.	1
Mt. Vernon, N. Y.	2
Newark, N. J.	1
New Brunswick, N. J.	3
New Rochelle, N. Y.	1
New York City, N. Y.	43

City	*No. of Theatres*
Providence, R. I.	1
Richmond Hill, N. Y.	1
Rochester, N. Y.	2
Rockaway Park, N. Y.	1
St. Paul, Minn.	1
San Francisco, Cal.	1
Syracuse, N. Y.	6
Trenton, N. J.	6
Union City, N. J.	1
Washington, D. C.	1
White Plains, N. Y.	1
Yonkers, N. Y.	3

and allege that they and KAO, or subsidiaries thereof, own the fee or the leasehold in or have an interest in the management or operation of, or in the proceeds or profits from [fol. 107] the operation of, or have other types of interest, by the ownership of stock and otherwise, in other theatres not referred to above which none of them operate, or control the operation thereof; and state that they are without knowledge or information sufficient to form a belief as to the classification between "metropolitan first-run theatres" and "other theatres". Except as admitted and alleged, they deny the allegations therein.

RKO Radio Pictures, Inc., states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

14. As to (60), admit that the name of FBO Productions, Inc., was ultimately changed to RKO Radio Pictures, Inc., and that RKO Radio Pictures, Inc., maintains studios for the production of motion pictures at Hollywood and Culver City, California, and, except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

15. As to (61), admit that the corporations that are subsidiaries of Radio-Keith-Orpheum Corporation that are or were engaged in production produced feature motion pictures in the numbers therein alleged which were released during the motion picture exhibition seasons therein set forth except that they produced 41 during the 1938-39 sea-

son, and not 49 as alleged, and, except as admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein. [fol. 108] 16. As to (62), admit that Radio-Keith-Orpheum Corporation purchased in January 1931 specified assets of Pathe Exchange, Inc., or subsidiaries thereof, including its newsreel business and certain facilities for the production of motion pictures, and that the assets so purchased were held by various subsidiaries of Radio-Keith-Orpheum Corporation. Except as so admitted, they deny the allegations therein.

17. As to (63), allege that RKO Radio Pictures, Inc., produced an average of 36 short subjects per year. The Van Beuren Corporation, which is now a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation but is in process of dissolution, produced, or had an interest in the production of, an average of 48 short subjects per year for the eight-year period ending 1937-38. During the same period Pathe News, Inc., which is a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, produced an average of 10 short subjects and 104 newsreels per year. Except as so alleged or admitted, they deny the allegations therein.

18. As to (64), allege that RKO Radio Pictures, Inc., presently maintains exchanges located in 32 cities for the distribution of motion pictures commonly known as "RKO product". During the 1936-37 season, it distributed 47 feature pictures. Usually, in each motion picture season, it distributes a number of pictures which are made by other producers. Except as so alleged, it denies each and every allegation therein.

19. As to (65), admit the allegations therein.

[fols. 109-112] 20. As to (66), Radio-Keith-Orpheum Corporation admits that it has gross assets of approximately $70,000,000, and, except as so admitted, denies each and every allegation therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

21. As to (67) through (86), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 113] 22. As to (87), the RKO defendants engaged in exhibition allege that in several cities where they or their subsidiaries own, operate or control theatres, the operation of some of these theatres is carried on in conjunction with the operation of theatres in which other defendants herein and other exhibitors have an interest, pursuant to various operating arrangements between them. Such other defendants are subsidiaries of Lowe's, Inc., Warner Bros. Pictures, Inc., and Paramount Pictures, Inc. The nature of such operating relationships varies with the [fols. 114-116] terms of the agreement under which the operation is carried on, and they vary so that they cannot be generically summarized as alleged in the complaint. Except as so alleged, they deny each and every allegation thereof.

The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

23. As to (88) and (89), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

24. As to (90) through (99), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 117] 25. As to (100) they admit that Radio-Keith-Orpheum Corporation had acquired between its incorporation in 1928 and 1930, the ownership of stock in companies that were engaged or subsidiaries of which were engaged in production, distribution and exhibition of motion pictures, and that the distribution system of RKO Distributing Corporation was nation-wide and that some of the pictures produced by RKO Radio Pictures, Inc., in 1930, cost as much as $500,000 or more to produce. Except as so admitted, they are without knowledge or information sufficient to form a belief as to the truth thereof.

26. As to (101), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., deny that they or any predecessor, either alone or in conjunction with any other person, now or ever had any control over the distribution of features costing in excess of $250,000, except in so far as they control their own distribution facilities. They admit

that RKO Radio Pictures, Inc., and RKO Distributing Corporation, its predecessor in distribution, has at times distributed feature pictures produced by companies or individuals other than RKO Radio Pictures, Inc. Some of the contracts under which some of such pictures were produced contained provisions for the use by the producer of equipment owned by and production talent under contract to RKO Radio Pictures, Inc., and for the financing of the cost of production in part by RKO Radio Pictures, Inc., or the borrowing of capital by the producer from other sources. Except as so admitted and denied, deny each and every allegation thereof.

The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations stated therein.

27. As to (102), RKO Radio Pictures, Inc., admits that equipment and technical and artistic talent necessary to produce profitable pictures has become more costly and [fol. 118] that competition for the use of such talent has increased the cost thereof, and except as so admitted deny each and every allegation therein.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

28. As to (103), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., deny each and every allegation thereof. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

29. As to (104), RKO Radio Pictures, Inc., admits that between January 1, 1933, and August 31, 1939, it loaned to other producers 91 stars, featured players, directors, writers, cameramen and other production talent who were under contract to it and received $250 per week or more in salary. Except as so admitted, it denies the allegations in so far as they state to them and state that they are without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to other defendants.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 119] 30. As to (105), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

31. As to (106), state that they are without knowledge or information sufficient to form a belief as to the truth thereof, except that RKO Radio Pictures, Inc., denies the last sentence thereof in so far as it purports to describe the manner in which it licenses its pictures.

32. As to (107), RKO Radio Pictures, Inc., admits that many of the license contracts it negotiates with exhibitors contain the terms relative to a group of features to be released during a releasing season, and admits that its production program is subject to change without notice.

Except as so admitted, denies each and every allegation in so far as they relate to it, and it states it is without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to other defendants.

[fol. 120] The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

33. As to (108), RKO Radio Pictures, Inc., admits that the quality of the various feature pictures it distributes, varies widely in box-office attraction, and that in many of its license agreements, prices for pictures are grouped in various brackets in accordance with anticipated quality and in consequence of the bargaining between buyer and seller. It admits that the features in the top price bracket sometimes have rental terms based upon a percentage of the box-office receipts, and sometimes against a guaranteed figure, and those in the lowest price bracket are ordinarily licensed for a flat rental. It admits that the pictures in each bracket are sometimes untitled and unidentified and that, as a result, in such cases a picture is not allocated to a price bracket until it is about to be or after it is released. It admits that the amount of gross revenue and number of bookings received by the features it distributes in the same season vary widely.

Except as so admitted, denies each and every allegation in so far as they relate to it and states it is without knowledge or information sufficient to form a belief as to the

truth thereof in so far as they relate to the other defendants.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 121] 34. As to (109), RKO Radio Pictures, Inc., denies that RKO Radio Pictures, Inc., releases each year a certain number of feature motion pictures which most of the exhibitors do not wish to exhibit at all. It alleges that each license agreement for its pictures is the result of free negotiation with the licensed exhibitor, and that in such negotiations RKO Radio Pictures, Inc., attempts to induce the exhibitor to purchase or license as many features as it has or will probably have available for that exhibitor, consistent with its sound business judgment.

It denies that RKO Radio Pictures, Inc., attempts to or does or has compelled any exhibitor to commit himself to buy or play any features which he does not want or cannot profitably exhibit, either as a condition of licensing other features which he does want, and can profitably exhibit, or any other condition. Except as so admitted, alleged and denied, deny each and every allegation therein.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

35. As to (110), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

[fol. 122] 36. As to (111), admit the allegations therein.

37. As to (112), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

38. As to (113), deny each and every allegation therein, except that RKO Radio Pictures, Inc., admits it does not make license agreements with one exhibitor that are inconsistent with rights granted by contract to another exhibitor.

[fol. 123] 39. As to (114) and (115), state that they were without knowledge or information sufficient to form a belief as to the truth of the allegations therein, except that they deny the allegations in (115) in so far as they relate to the period between 1927 and 1931.

40. As to (116), deny each and every allegation therein in so far as they relate to them, and state that they are without knowledge or information in so far as they relate [fol. 124] to other defendants, except that Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit that, with the knowledge and acquiescence of the plaintiff, RKO Distributing Corporation participated in conferences to establish the basis for clearance schedules by voluntary agreement of all parties affected.

41. As to (117), they admit that the United States District Court for the District of Nebraska rendered a decision on July 2nd, 1932, in a case entitled *Youngclaus* v. *Omaha Film Board of Trade, et al.*, in which RKO Distributing Corporation was a party defendant (which decision is reported in 60 F. (2d) 538), that an agreement among distributors which is therein set forth restrained trade in violation of the Sherman Act, and except as so admitted, deny each and every allegation therein, and allege that they have at all times refrained from entering [fol. 125] into any agreement, express or otherwise, as therein alleged.

42. As to (118), RKO Radio Pictures, Inc., admits that a Code for the motion picture industry was duly adopted pursuant to the National Industrial Recovery Act, and except as so admitted, denies each and every allegation therein, in so far as they relate to it, and alleges that it has made no effort, by express agreement with other distributors, or otherwise, to establish uniform clearance schedules or zones.

The other answering defendants state that they were without knowledge or information sufficient to form a belief as to the truth thereof.

43. As to (119) and (120), deny each and every allegation therein in so far as they relate to them respectively. [fol. 126] 44. As to (121), deny each and every allegation therein, except they admit that most of the license agreements entered into by them, either as licensor, or licensee, cover only a single season's output of pictures of the licensor, but that at times they have entered into license agreements for a period of more than a single season, commonly known as franchises. RKO Radio Pic-

tures, Inc., have entered into such license agreements not only with "affiliated" and "unaffiliated" circuit exhibitors, but also "independent" exhibitors. They state that they are without knowledge or information as to the allegations relative to the periods of franchises, or the maximum amount of film rental, or number of theatres or localities involved in "a single franchise."

45. As to (122), admit that a franchise, or a license of the exhibition of motion pictures for more than a single season, like any license agreement for motion pictures, is advantageous to the licensee in that it assures the licensee a supply of motion pictures therein licensed, provided the licensor is able to perform; and allege that they, as licensor or licensee, grant or are granted rights under a franchise, the franchisor is unable to grant to other exhibitors during the term thereof rights inconsistent therewith. Except as so admitted, deny each and every allegation therein in so far as they relate to them and state that they are without knowledge or information sufficient to form a belief in so far as they relate to other defendants.

[fol. 127] 46. As to (123), deny each and every allegation in so far as they relate to them, and state they are without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to the other defendants.

47. As to (124), admit that an exhibitor, in negotiating a license agreement, attempts to secure the most favorable terms for all the theatres for which he is negotiating, and admit that they either, as licensor or licensee as the case may be, at times negotiate at the same time in respect to all the theatres that compose a circuit. They deny that as [fol. 128] a result of the matters therein alleged, an independent exhibitor, operating a single theatre or a large number of theatres in competition with a circuit, is unable to compete for the privilege of licensing the films distributed by RKO Radio Pictures, Inc. (or pictures distributed by other distributors for which an answering defendant engaged in exhibition is negotiating), and deny that such independent exhibitor is frequently or ever excluded from consideration as a prior-run outlet in the manner or as a result of the matters therein alleged; and, except as so admitted and denied, deny the allegations therein.

48. As to (125), deny each and every allegation therein. [fol. 129] 49. As to (126), admit that prior to national release date a number of prints of a feature are delivered to each branch exchange of RKO Radio Pictures, Inc., in accordance with the number of accounts in that exchange and the prospective popularity of the picture. Upon or shortly after the arrival of the prints at the exchange, the feature is sometimes privately screened, or exhibited for the benefit of the salesmen and the trade. Thereafter, if the exhibitor who has, by license agreement, the right to exhibit the feature pictures distributed by RKO Radio Pictures, Inc., in that area on first-run, books said feature, it is exhibited first in that exhibitor's theatre. Upon its return to the exchange office, after completion of first-run exhibition, it is exhibited by other exhibitors in that area in accordance with their respective playing positions as provided for by their license agreements with the distributor. If the first-run exhibitor elects not to book or play said feature, RKO Radio Pictures, Inc., either attempts to license it to another exhibitor to be exhibited on first-run or makes it available to be booked by the subsequent-run exhibitors who have contracted for its use, in the order established by their respective license agreements. They admit that at times the pictures they reject as first-run licensees, or, as to RKO Radio Pictures, Inc., the pictures which its first-run licensees reject, are inferior as box-office attractions to those selected. Except as so admitted, they deny each and every allegation therein.

50. As to (127), deny each and every allegation therein except that RKO Radio Pictures admits that licensees having the right to exhibit its pictures first-run usually charge higher admission prices than its subsequent run exhibitors in that area. They state that they are without knowledge or information sufficient to form a belief in so far as the allegations relate to other defendants.

51. As to (128), RKO Radio Pictures, Inc., admits that the admission prices charged by exhibitors on both first and subsequent run are a factor it considers in determining the run and clearance on which it will license an ex- [fol. 130] hibitor and that its first-run exhibitors usually charge the highest admission prices in their area and that

the run of subsequent-run exhibitors tends to vary with the relative admission price charged, and except as so admitted, deny each and every allegation therein.

RKO Proctor Corporation and RKO Midwest Corporation admit that, in respect to first-run license agreements they negotiate with distributors who are defendants herein, the admission prices they propose to charge are a factor in securing first-run exhibition, and that, in the areas where they operate theatres, the run of subsequent-run exhibitors tends to vary with the relative admission prices charged, and, except as so admitted, deny each and every allegation therein.

Radio-Keith-Orpheum Corporation states it is without knowledge or information sufficient to form a belief as to the truth thereof.

52. As to (129) and (130), deny each and every allegation therein.

[fols. 131-132] 53. As to (131) and (132), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 133] 54. As to (133), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein in so far as they purport to describe the production of feature length pictures by RKO Radio Pictures, Inc., except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that personnel employed in such production is in many instances drawn across state lines from all parts of the nation, and that costumes and raw materials entering into the making of pictures in many instances are manufactured outside the State of California and shipped across state lines to the studios. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

55. As to (134), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

56. As to (135), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit and allege that, as to pictures produced by RKO Radio Pictures, Inc., after the

scenes going to make up a motion picture have been photographed, the negatives of such pictures are developed by an independent contractor in California. The negative is then cut, fixed, edited, and then usually shipped by it to New York or New Jersey, where positive prints are made by another independent contractor. They admit that the number of positive prints so made varies between fifty (50) and upwards of two hundred and fifty (250), and are made to fulfill the contractual requirements of RKO Radio Pictures, Inc., for the picture in question. Said positive prints are the motion picture films which are projected through the motion picture projectors onto the screens of motion picture theatres, and admit that in most cases said positive prints are shipped across state lines to the branch exchanges maintained by RKO Radio Pictures, Inc. Except [fol. 134] as so admitted, they deny the allegations therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

57. As to (136), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein in so far as they relate to RKO Radio Pictures, Inc.; the other answering defendants state that they lack knowledge or information sufficient to form a belief as to the truth thereof.

58. As to (137), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein, in so far as they relate to them, except that they allege that their salesmen solicit exhibits to enter into license agreements both before and after the production program for the ensuing season is arranged and fixed. The other answering defendants state that they lack knowledge or information sufficient to form a belief as to the truth thereof.

59. As to (138), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

60. As to (139), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein

in so far as they relate to RKO Radio Pictures, Inc., except they allege that positive prints are seldom delivered from one exhibitor to another without being returned to the branch exchange for examination and repair and temporary storage. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to their truth.

[fol. 135] 61. As to (140), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. deny each and every allegation therein, except they admit that the production of motion pictures by RKO Radio Pictures, Inc. involves, in part, the assemblage of personnel, property and material at its studios and on location; that the distribution of motion pictures by RKO Radio Pictures, Inc., involves, in part, the solicitation and making of contracts for the delivery of motion pictures produced and to be produced, the transportation of negative films from California to laboratories in New York and New Jersey where positive prints of said motion pictures are prepared and thence shipped to the film exchanges of RKO Radio Pictures, Inc. throughout the United States, the delivery of said prints from said exchanges to and from the motion picture theatres located in the areas served by the respective exchanges, the occasional interchange of said prints between various exchanges of RKO Radio Pictures, Inc., some of which may be located in other states of the United States, and finally the shipment of said prints from said exchanges to New York for scrapping.

The answering defendants that are engaged in exhibition state that they are without knowledge or information sufficient to form a belief as to the truth thereof, except that they deny that the operation of a theatre, the exhibition of motion pictures, and the making of arrangements incident thereto is interstate commerce or is a part of interstate commerce, or a part of a constant, continuous stream of trade and commerce between the states.

62. As to (141), deny each and every allegation therein.

[fols. 136-143] 63. As to (142) through (150), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. deny each and every allegation therein.

The other answering defendants state that they are

without knowledge or information sufficient to form a belief as to the truth thereof.

[fols. 144-148] 64. As to (158) through (165), deny each and every allegation therein.

[fol. 149] 65. As to (166) through (169), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. deny each and every allegation therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 150] 66. As to (170) through (177), deny each and every allegation therein.

[fol. 151] 67. As to (178), deny each and every allegation therein.

68. As to (179), deny each and every allegation therein.

[fol. 152] 69. As to (180) through (187), deny each and every allegation therein.

[fol. 153] 70. Deny each and every allegation in the amended and supplemental complaint that relates to them, which has not been hereinabove admitted, denied, or otherwise answered; and state that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation in said complaint, in so far as they or any of them relate to other defendants and have not been hereinabove admitted, denied, or otherwise answered.

Wherefore, having made complete answer to the Amended and Supplemental Complaint herein, the answering defendants respectfully pray that an order be entered dismissing said complaint, with prejudice, and that the answering defendants be awarded costs and disbursements and such other relief as the Court may deem just and proper.

November 14, 1940.

William J. Donovan (signed), William Mallard (signed), Solicitors for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation and RKO Midwest Corporation.

[fol. 154] Admission of Service—Omitted in printing

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF KEITH-ALBEE-ORPHEUM CORPORATION TO AMENDED AND SUPPLEMENTAL COMPLAINT

The defendant Keith-Albee-Orpheum Corporation by its solicitors, Goldwater & Flynn, Esqs., answering the amended and supplemental complaint herein, alleges as follows:

1. Denies each and every allegation of the following paragraphs of the complaint insofar as they relate, or purport to relate, to the answering defendant, and denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations insofar as they relate to the other defendants: 2, 116, 119, 129, 130, 150, 151, 152, 153, 154, 155, 156 157, 158, 159, 160, 161, 162, 163, 164, 165, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186 and 187.

2. Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation in the following paragraphs of the complaint: 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 60, 61, 62, 63, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111 [fol. 156] 112, 113, 114, 115, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 139, 142, 143, 144, 145, 146, 147, 148, 149, 166, 167, 168, and 169.

3. Denies so much of paragraph 1 of the complaint as alleges, or purports to allege, that the answering defendant has violated, is violating, or intends to violate, Section 1 or Section 2 of the Sherman Anti-Trust Act in the manner alleged in said complaint, or in any other manner, either individually or with any other person, or persons, and denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of each and every other allegation therein.

4. Denies so much of paragraph 5 (c) of the complaint as alleges that Keith-Albee-Orpheum Corporation is engaged in the business of exhibiting motion pictures and alleges that Keith-Albee-Orpheum Corporation owns stock and other securities in corporations which are engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated corporations.

5. Admits that the terms defined in paragraphs 15, 16 and 17 of the complaint may possibly have the meanings therein set forth but denies that said definitions are in all respects accurate or that they are commonly accepted by the motion picture industry.

6. Admits so much of paragraph 56 of the complaint as alleges that Radio-Keith-Orpheum Corporation was incorporated under the Laws of the State of Maryland on October 25, 1928, and that since its incorporation, it has been primarily a holding company, and that shortly after its organization it acquired substantially all of the common stock of Keith-Albee-Orpheum Corporation and FBO Pro- [fol. 157] ductions, Inc., and alleges that at the time of the acquisition by Radio-Keith-Orpheum Corporation of the common stock of Keith-Albee-Orpheum Corporation, Keith-Albee-Orpheum Corporation was engaged in the business of holding stock and other securities in corporations engaged in operating theatres for the exhibition of vaudeville and motion pictures, either directly or through subsidiary or associated corporations and further alleges that Radio-Keith-Orpheum Corporation now holds approximately 99.85% of the common stock of Keith-Albee-Orpheum Corporation, and approximately 33.8% of the preferred stock of said corporation, and that the Certificate of Incorporation of Keith-Albee-Orpheum Corporation provides that whenever six quarterly dividends on the preferred stock shall be unpaid, in whole or in part, the entire voting power for the election of a majority of the Board of Directors shall be exclusively vested in the preferred stock until all such arrears have been paid; that six quarterly dividends on the preferred stock of Keith-Albee-Orpheum Corporation have been in arrears since on or about April 1, 1933; that whether or not Radio-Keith-Orpheum Corporation has the right to elect a majority of the Board of Directors

of Keith-Albee-Orpheum Corporation depends upon whether it is entitled to cumulative voting in respect of the preferred stock held by it; that certain large holders of preferred stock of Keith-Albee-Orpheum Corporation have challenged such right and that the question has never been submitted to the Courts; that the Board of Directors of Keith-Albee-Orpheum Corporation, since June 19, 1933, has been selected by mutual agreement between the principal stockholding groups; that since 1933 Radio-Keith-Orpheum Corporation has not controlled that Board of Directors of Keith-Albee-Orpheum Corporation or the activities of that Corporation. Except as hereinabove admitted and alleged, the answering defendant denies that [fol. 158] it has knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in said paragraph 56 of the complaint.

7. Admits so much of paragraph 57 of the complaint as alleges that Keith-Albee-Orpheum Corporation was incorporated on January 28, 1938 under the Laws of the State of Delaware and on, to-wit, February 16, 1928, acquired as of January 1, 1928 all of the issued and outstanding stock of B. F. Keith Corporation, and approximately 90% of the issued and outstanding common stock of Orpheum Circuit, Inc. and that B. F. Keith Corporation owned or operated, directly, or owned stock in corporations which owned or operated, a number of theatres in various cities in the eastern part of the United States which, prior thereto, were engaged primarily in the exhibition of vaudeville, either alone or in conjunction with the exhibition of motion pictures, and that Orpheum Circuit, Inc. owned or operated directly, or owned stock in corporations which either owned or operated theatres located in the midwestern and western parts of the United States, and except as so admitted and alleged, denies the allegations of paragraph 57 of the complaint.

8. Denies so much of paragraph 59 of the complaint as alleges, or purports to allege, that those theatres owned, operated or controlled by subsidiaries of Keith-Albee-Orpheum Corporation which are included in tables (a) and (b) of said paragraph, are now operated by RKO, and denies that it has any knowledge or information thereof

sufficient to form a belief as to the truth of the other allegations of said paragraph 50.

9. Admits so much of paragraph 64 of the complaint as alleges that RKO product is distributed by RKO Radio Pictures, Inc. and denies that it has any knowledge or information thereof sufficient to form a belief as to the [fol. 159] truth of the other allegations thereof.

10. Admits so much of paragraph 87 of the complaint as alleges that in the cities where the subsidiaries of Keith-Albee-Orpheum Corporation own, operate or control theatres, the operation of some of these theatres is carried on in conjunction with the operation of theatres in which the other defendants herein, and other exhibitors, have an interest, pursuant to various operating arrangements between them and, except as so admitted, denies each and every allegation thereof.

11. Admits so much of paragraph 100 of the complaint as alleges that Radio-Keith-Orpheum Corporation had acquired, between its incorporation in 1928 and 1930, the ownership of stock in companies that were engaged in production, distribution and exhibition of motion pictures, and except as so admitted, denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations thereof.

12. Denies so much of paragraphs 140 and 141 of the complaint as allege, or purport to allege, that the exhibition branch of the motion picture industry is either in, or directly affects trade or commerce among the several states.

Further Answering the Complaint, and as a First, Separate Defense Thereto, Defendant Alleges:

13. That this Court has no jurisdiction over the matters and things alleged in the complaint.

[fol. 160] Further Answering the Complaint, and as a Second, Separate Defense Thereto, Defendant Alleges:

14. That the petition fails to state a claim as to the answering defendant on which any relief can be granted.

Wherefore, having made complete answer to the complaint, the answering defendant prays that this complaint be dismissed as to it, and that it be awarded its costs and

disbursements and such other and further relief as to the Court may seem just and proper in the premises.

Dated, New York, N. Y., November 14th, 1940.

Monroe Goldwater, Goldwater & Flynn, Solicitors for Keith-Albee-Orpheum Corporation, 60 East 42 Street, New York, N. Y.

[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

THE CONSENT DECREE AND RULES OF ARBITRATION AND APPEALS

[fol. 162] Decree

The United States of America having filed its Petition herein on July 20, 1938, and its Amended and Supplemental Complaint on November 14, 1940; the defendants: Paramount Pictures Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation [1] having appeared and severally filed their answers to such Petition and to such Amended and Supplemental Complaint and having asserted the truth of their answers and their innocence of any violation of law; and no testimony having been taken, but each of the consenting defendants having consented to the entry of this decree without any findings of fact, upon condition that neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being (1) an admission or adjudication that the allegations

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[1] The above named defendants are referred to hereinafter as the consenting defendants.

of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated or are or is violating any statute or law, or (2) evidence that such allegations, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated any statute or law, or (3) an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of any statute or law, and upon the further conditions hereinafter set forth; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof upon such conditions, and having moved the Court for the entry of this decree;

Therefore, it is ordered, adjudged and decreed as follows:

I.—Jurisdiction

The Court has jurisdiction of the parties hereto; and for the purposes of this decree and of proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

The Petitioner not having offered any proof of its allegations that defendants have violated the antitrust laws, and defendants having denied each and every such allegation, this Court has not determined or adjudicated and by this decree does not determine or adjudicate, and this is not a decree to the effect that any of said defendants has violated or is now violating any of such laws, or any other statute; and this decree relates solely to future conduct herein below specified and is not based upon any finding, determination, or adjudication that any right or statute has yet been or is now being violated.

II.—Enjoinment

Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required.

III.—Trade Shows

No consenting defendant engaged in the distribution of motion pictures (hereinafter referred to as a distributor defendant) shall license or offer for license[1] a feature motion picture[2] (hereinafter sometimes referred to as a feature) for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown[3] within the exchange district[4] in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a trade publication[5] having general circulation among ex-

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[1] License means (as a verb) to make an agreement, or (as a noun) an agreement, by which a distributor grants the right to exhibit a motion picture in any theatre engaged in the exhibition of motion pictures for profit.

[2] A feature motion picture is a motion picture approximately 5,000 feet, or more, in length.

[3] A trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally.

[4] Each distributor defendant shall file with the Department of Justice a map of each of its exchange districts, showing the territorial limits thereof. Changes in the territorial limits of an exchange district shall be made only after two weeks' notice to the Department of Justice. References in this Section and in Sections V, IX and XVIII hereof to exchange districts are to exchange districts of each distributor defendant, as constituted from time to time.

[5] Trade publication means a daily or weekly newspaper or magazine which is devoted primarily to news concerning the motion picture industry.

hibitors [1] in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

IV.—Blocks of 5

(a) No distributor defendant shall offer for license or shall license more than five features in a single group. In offering its features for license to an exhibitor a distributor may change the combinations of features in groups as it may from time to time determine, and may license or offer for license as many groups of features as it may from time to time determine, provided that the license or offer for license of one group of features shall not be conditioned upon the licensing of another feature or group of features.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[2] or foreigns [3] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

Where a license has been entered into, controversies arising upon a complaint by an exhibitor that the licensing to him of one group of features was conditioned by the distributor upon the licensing of another feature or group of features or the licensing of shorts or foreigns shall be subject to arbitration. An exhibitor shall have no right

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[1] Exhibitor means any individual, partnership, unincorporated association or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit.

[2] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[3] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

to assert any such claim unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds thereof, not later than two days after receipt by the exhibitor of the distributor's written approval of the exhibitors' signed application or applications for such features, shorts or foreigns. The power [1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of such features was so conditioned; and, if the finding be in the affirmative, (2) an award cancelling the license for (or to the extent that it may relate to) such other feature or group of features, or such shorts or foreigns.

Where no license has been entered into, controversies arising upon a complaint by an exhibitor that a distributor defendant has offered for license to him more than five features in a single group or that the offer of a license to him of one group of features was conditioned upon the licensing of another feature or group of features, or the licensing of shorts or foreigns, shall be subject to arbitration. An exhibitor shall have no right to assert any claim that an offer so to license such features was so made or conditioned unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds therefor not later than five days after the exhibitor claims the alleged offer was made. The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such features was so made or conditioned; and, if the finding be in the affirmative, (2) an award imposing upon the distributor making such offer a penalty in an amount not to exceed five hundred dollars ($500.00). Such penalty shall be payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

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[1] When, in any arbitration under this decree, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

[2] See footnote 3 to this Section.

V.—Licenses by Exchanges

No license for features to be exhibited in theatres located in one exchange district [1] shall include theatres located in [fol. 163] another exchange district, nor shall the licensing of features for exhibition in theatres located in one exchange district be conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district.

Controversies arising upon a complaint by an exhibitor thereby affected that the licensing by a distributor defendant of features for exhibition in theatres located in one exchange district was conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district shall be subject to arbitration. The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of features for exhibition in theatres located in one exchange district was so conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district; and, if the finding be in the affirmative, (2) an award imposing upon the distributor defendant so licensing features a penalty in an amount not to exceed five hundred dollars ($500.00), payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

VI.—No Licensing Refusal

No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising upon a com-

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[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

plaint by an exhibitor that, contrary to the provisions of this Section, a distributor defendant has refused so to license its pictures shall be subject to arbitration. The power [1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not, contrary to the provisions of this Section, the distributor has refused to license its pictures to the complainant for exhibition in said theatre; and, if the finding be in the affirmative, (2) an award directing the distributor to offer its pictures for lisense to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor's total film revenue in said area, he shall vacate the award.[2]

VII.—Cancellation Rights

Controversies arising upon the complaint of an exhibitor that a feature licensed to him by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality served by such theatre on moral, religious or racial grounds shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless written notice of his election to cancel such feature, together with a statement of his reasons therefor, shall have

[1] See footnote 3 to Section IV.

[2] See footnote 3 to Section IV.

been mailed to the distributor defendant at its Home Office not later than ten days after the receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application for such feature. In such event the license in so far as it relates to the exhibition of such feature in the theatre specified in the notice shall be deemed cancelled unless within five days after receipt of such notice, the distributor shall have mailed to the exhibitor a notice in writing of its denial of such claim and of its intention to arbitrate the controversy. The power [1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the feature is generally offensive in the locality served by the exhibitor's theatre on moral, religious or racial grounds; and, if the finding be in the affirmative, (2) an award cancelling the license in so far as it relates to the exhibition of such feature in said theatre.

VIII.—Clearance

Controversies arising upon the complaint of an exhibitor that the clearance [2] applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

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[1] See footnote 3 to Section IV.

[2] Clearance means the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power[1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change,[2] he shall make a redetermination of the maximum clearance.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for

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[1] See footnote 3 to Section IV.

[2] See footnote 3 to Section IV.

any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature,[1] provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

IX.—Booking Prints

In booking prints for exhibition by exhibitors compet- [fol. 164] ing on the same run in the same exchange district,[2] a distributor defendant shall not withhold delivery of prints available in its exchange from one exhibitor in order to give a competing exhibitor a prior playing date not provided for in his license. It is recognized that distributors must be permitted discretion in the ordinary course of booking and distributing films in an exchange district when too few prints are available in the exchange for the playing date desired by two or more theatres. In such cases this Section shall have no application.

Violation of this Section shall be subject to arbitration and, if the arbitrator finds [3] that the ditsributor complained against has pursued a policy of withholding available prints from the complaining exhibitor in violation of this Section, he shall enter an award directing the distributor to discontinue such policy.

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[1] For teh purposes of this Section, a special feature means a feature which for a period of time is exhibited at generally advanced first-run admission prices.

[2] See footnote 4 to Section III.

[3] See Footnote 3 to Section IV.

X.—Refusal to License

A. Controversies arising upon a complaint by an independent exhibitor[1] that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by said exhibitor in one of said exhibitor's theatres which was in existence or which replaced[2] a theatre in existence at the date of this decree shall be subject to arbitration.

B. In any such arbitration no award shall be made against a distributor defendant unless the arbitrator shall first find the following facts:

(1) The complainant is an independent exhibitor and the theatre operated by him and specified in his complaint was in existence at the date of the decree or replaced such a theatre; and

(2) Such refusal of the distributor to license its features for exhibition in the complainant's theatre on the run requested by the complainant continued during a period of not less than three successive months; and

(3) The distributor during such period has licensed the features requested by the Complainant on the run requested by him to a theatre (sometimes hereinafter referred to as a circuit theatre) which was in competition with the theatre specified in the complaint and which was a component of a circuit of not less than 15 theatres or which was affiliated either by stock ownership, common ownership, common

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[1] An independent exhibitor, as used in this Section, is one wholly independent of any circuit of more than five theatres and not affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of more than five theatres and whose licenses are not negotiated by a buying combine or common buying agent negotiating for more than five theatres.

[2] A theatre shall not be deemed to have replaced such an existing theatre unless erected in the same neighborhood as one which was destroyed or permanently abandoned as a theatre, for the purpose of succeeding to its patronage, and with a seating capacity not more than 25 per cent greater than that of the theatre replaced.

buying or otherwise with a circuit of not less than 15 theatres or the licenses for which were negotiated by a buying combine or common buying agent negotiating for not less than 15 theatres; and

(4) The complainant's theatre has not available to it features sufficient in nature and quantity to enable it to operate on the run requested by the complainant; and

(5) (a) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant operated the theatre specified in his complaint on the same run as of on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or

(b) Subsequent to July 20, 1940 and during the two consecutive motion picture seasons [3] immediately preceding the filing of the complaint, the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint and during such period exhibited on such run substantially all the features released during such period by the distributor complained against; or

(c) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant demanded in writing [4] features for the theatre specified in his complaint from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; or

(d) The complainant operated the theatre specified in his complaint for at least one year prior to the entry of this decree, and subsequent to July 20, 1935 and prior to July 20, 1940 a prior operator of said theatre had de-

[3] A motion picture season means the period from September 1 of one year to August 31 of the next year.

[4] Demands in writing shall be deemed to include complaints in writing to the Department of Justice.

manded in writing[1] features from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; and

(6) Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on the run requested by the complaint was a circuit theatre.

C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributor; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability[2] for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated

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[1] See footnote 4 to this Section.

[2] In considering this factor in situations where the exhibitor customarily exhibits features in two or more theatres on the same run in the same situation as a unit by contracting for groups of features on an "or" basis (i.e., for exhibition at one of two or more specified theatres) all of such theatres may be considered collectively as a unit.

and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom.

D. If in any such arbitration the arbitrator finds[1] for the complainant, he may enter an award against the distributor which shall not affect the license to exhibit any feature then under license to the circuit theatre but which shall prohibit such distributor from thereafter licensing its features for exhibition either in the circuit theatre specified in the complaint on the run requested by the complainant, or in the complainant's theatre specified in the complaint, on such run; otherwise than by a separate contract or agreement which shall not be a part of any contract or agreement for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.

E. After a final award in favor of a complaining exhibitor has been made under this Section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who entered the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor against which it was entered. If in any such proceeding the arbitrator shall find[2] that the distributor has not complied in good faith with the original award, the arbitrator may award damages to the exhibitor for loss resulting from the distributor's failure to comply with the original award but any such award of damages shall be purely compensatory.

Any further arbitration proceeding for an award of damages for violation of the original award must be commenced within sixty days after such violation has occurred, by filing a statement specifying the facts constituting each alleged violation for which damages are sought

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[1] See footnote 3 to Section IV.

[2] See footnote 3 to Section IV.

and the exhibitor's alleged damages resulting from each such alleged violation. No award of damages shall be made in any such proceeding for any violation of the original award not occurring within said sixty day period, but [fol. 165] prior violations may, in any such proceeding, be considered by the arbitrator as evidence bearing upon the question of the distributor's good faith.

XI.—Acquiring Theatres

(1) For a period of three years after the entry of the decree herein each of the consenting defendants will notify [1] the Department of Justice immediately of any legally binding commitment for the acquisition by it of any additional theatre or theatres.

(2) During such period each such defendant will also report [2] to the Department of Justice on or before the tenth day of each month the changes in its theatre position, if any, that have occurred during the preceding month,

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[1] The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

[2] The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

as follows, together with a statement of the reasons for such changes:

(a) Theatres contracted to be built, or under construction;

(b) Theatres lost or disposed of;

(c) Theatres acquired;

(d) Interests in theatres acquired, with a statement of the nature and extent of such interests.

(3) If upon receipt of such information the Department of Justice requests any such defendant to furnish further information with respect to any of the above transactions in which it is involved, such defendant will make a reasonable effort to supply such information promptly.

(4) No information furnished under subdivision (1), (2) or (3) hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business. Proceedings based on a violation of this subdivision (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section.

XII.—Cause for Inoperation

(a) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, requiring each of them to trade show its features before licensing the same for exhibition, Section III of this decree, after said date, shall be inoperative and of no bind-

ing force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(b) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, limiting the number of features which may be licensed in a single group, subdivision (a) of Section IV of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(c) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions requiring each of them to trade show its features before licensing the same for exhibition, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with Section III of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject said defendant or defendants to such provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of Section III of this decree.

(d) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions limiting the number of features which may be licensed in a single group, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further com-

pliance with subdivision (a) of Section IV of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject such defendant or defendants to said provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of subdivision (a) of Section IV of this decree.

(e) If, prior to June 1, 1942, (1) a decree containing the provisions referred to in subdivision (c) hereof, or (2) a decree containing the provisions referred to in subdivision (d) hereof, or (3) a decree containing the provisions referred to in both of said subdivisions, shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, but an appeal therefrom has been taken or any of said provisions have not become operative and of full force and effect, then the operation of the provisions dealing with the same subject matter contained in Section III or subdivision (a) of Section IV of this decree shall be suspended and shall be of no binding force and effect upon any consenting defendant except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to said date and subsequent to August 31, 1941, unless and until such decree shall become final and such provision shall be in full force and effect against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation. After such decree shall have become final, any consenting defendant may at any time exercise its right of election provided for in subdivisions (c) and (d) of this Section.

(f) If, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall require the trade showing of features before licensing the same for exhibition, each of the consenting defendants shall be relieved from further compliance with Section III of this decree, and if, at any time, an Act of Congress or a rule

or regulation made pursuant to an Act of Congress shall limit the number of features that may be licensed in a single group, each of the consenting defendants shall be relieved from further compliance with subdivision (a) of Section IV of this decree. In either of such events any consenting defendant may at any time make application to this Court, of which notice shall be served upon Petitioner and all other consenting defendants, for an order relieving the consenting defendants, and each of them, from further compliance with Section III or subdivision (a) of Section IV of this decree, or both, as the case may be, and vacating the same, and thereupon this Court shall make and enter such an order.

(g) At any time after September 1, 1943, any consenting defendant may move to vacate the then effective provisions of Section III and subdivision (a) of Section IV of this decree by filing an application under oath stating that during any consecutive twelve months period preceding the filing of such application either (1) distributors of motion picture films have licensed 25 per cent or more of the features released for exhibition in the United States otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree [1] or (2) 12½ per cent or more of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, has been derived from pictures [fol. 166] licensed otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree.[2]

Petitioner and all other consenting defendants shall be served with notice of the filing of such application.

Upon such application the Court shall enter an order relieving the defendants from further compliance with the

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[1] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

[2] See footnote 1 to this Section.

provisions of Section III and subdivision (a) of Section IV of this decree, unless within sixty (60) days after service of such application Petitioner shall establish to the satisfaction of the Court that during said twelve months period less than 12½ per cent of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, had been derived from pictures licensed otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree.[1]

(h) At any time after September 1, 1942, any consenting defendant may apply to the Court to vacate the provisions of Section III and subdivision (a) of Section IV of this decree, or the provisions of either of such Sections, and upon such application, the Court shall enter an order relieving the consenting defendants from further compliance with such provisions, upon such defendant showing to the satisfaction of the Court that, subsequent to said date and by reason of the competition of persons not selling exclusively in accordance with said provision of said Sections, or of either of them,[2] compliance by the applicant defendant with such provisions of said Sections, or of either of them, has substantially and adversely affected the applicant defendant's business.

XIII.—Applies Only to U. S.

Nothing contained in this decree shall apply to operations or activities of any consenting defendant outside of the continental United States[3] or to operations or activities of any consenting defendant within the continental United States in so far as they relate to the distribution or exhibition of motion pictures outside of the continental United States.

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[1] See footnote 1 to this Section.

[2] See footnote 1 to this Section.

[3] The continental United States as used herein means the territory within the boundaries of the forty-eight states and the District of Columbia.

XIV.—Road Shows

Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing[1] of such picture upon such terms and conditions as may be fixed by the distributor.

XV.—Prior Franchises

The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof.

XVI.—Refusal to Arbitrate

No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such defendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award[2] made and entered in such an arbitration proceeding.

XVII.—Rights to License

Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right

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[1] Road showing is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar.

[2] For the purposes of this Section the final award in any arbitration proceeding under Section X of this decree shall be only a final award for damages as therein provided.

of each distributor defendant [1] to license the exhibition, or in any way to arrange or provide for the exhibition in such manner, upon such terms and subject to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which it directly or indirectly, by stock ownership or otherwise, owns a financial interest at the time of the entry of this decree and also at the time of such license, and (2) in any theatre in the ownership, lease, management or operation, or in the proceeds of profits from the management or operation, of which such distributor defendant acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent and (3) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which a company in which such defendant owned not less than 42 per cent of the common stock at the date of the decree and at the time of such license,[2] acquires after the

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[1] For the purpose of this Section (1) defendant RKO Radio Pictures, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Radio-Keith-Orpheum Corporation, or its successors, directly or indirectly, has; and (2) defendant Vitagraph, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Warner Brothers Pictures, Inc., or its successors, directly or indirectly, has.

[2] In the case of the distributor defendant Twentieth Century-Fox Film Corporation, or its successors, the defendant National Theatres Corporation, or its successors, shall be deemed to be such a company if said distributor defendant owned not less than 42 per cent of its common stock at the date of the decree and not less than 35 per cent of

date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent.

XVIII.—Compliance

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any consenting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present. Without in any way limiting the rights granted in the foregoing provisions of this Section each of the distributor defendants shall keep at its principal office current records, which shall be accessible for the purpose aforesaid, showing—

(1) The dates when and the places where each of its features is trade shown, the names of the trade publications wherein notice of each trade showing was published, and the dates of publication; the name and location (by town and exchange district [1]) of each

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its common stock at the time of such license, provided not less than 42 per cent of its common stock is owned by Twentieth Century-Fox Film Corporation, or its successors, and by present or future officers or directors of National Theatres Corporation, or its successors.

[1] See footnote 4 to Section III.

theatre in which each feature is licensed for exhibition, and the date of license thereof;

(2) As to each license entered into by it, the date thereof and the names and location (by town and exchange district [1]) of the theatres involved, the names of the parties thereto and of the distributor's sales representative who negotiated the license, and the names of the features licensed for exhibition;

(3) All arbitration awards rendered against the distributor with a statement showing what the distributor has done to comply therewith.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

XIX.—Customers

Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the right of any distributor defendant to select its own [fol. 167] customers, to bargain with them in accordance with law, or to negotiate with or to license to or to accept any offer from any exhibitor to license its motion pictures or any number thereof upon such terms and conditions as it deems advisable or to its best interests.

XX.—Feature Pictures

The provisions of Section III, of subdivision (a) of Section IV, of Section V and of Section X of this decree shall have application only with respect to features released in the United States after August 31, 1941.

XXI.—Trial Period

Petitioner, by its counsel, has represented to the Court that the public interest requires that the provisions of

[1] See footnote 4 to Section III.

this decree shall operate for a trial period of three years from the date of entry hereof. Petitioner has further represented to the Court, and each of the consenting defendants has consented to the entry of this decree upon the condition, that Petitioner will not for a period of three years after the entry of this decree, either in this action or any other action or proceeding against any such defendant seek either the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the Petition filed herein July 20, 1938, or in paragraphs (5), (6) and (7) of Section VIII of the Amended and Supplemental Complaint filed herein November 14, 1940, or otherwise seek to divorce the production or distribution of motion pictures from their exhibition; or to dissolve any such defendant or any corporation in which any such defendant has, directly or indirectly, a substantial stock interest and which is engaged in the exhibition of motion pictures or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation; or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof, direct or indirect, in motion picture theatres in which it had an interest at the date of the entry of this decree.

XXII.—Arbitration Method

1. The method and conditions of and the procedure for the arbitration of claims and controversies hereinbefore provided for in this decree, as well as the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in an action entitled "United States of America, Petitioner, against Balaban & Katz Corporation, et al., Defendants," modifying a consent decree entered in said action on April 6, 1932, and the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Southern District of California, Central Division, in an action en-

titled "United States of America, Plaintiff, vs. West Coast Theatres, Incorporated, et al., Defendants," modifying a consent decree entered in said action on August 21, 1930, shall be as specified in this Section and in the Rules of Arbitration and Appeals which are provided for hereinafter.

2. An arbitration system for the arbitration of claims and controversies referred to in this decree shall be administered by an impartial Administrator.

The Administrator shall establish and maintain an Arbitration Tribunal in each city in the United States in which three or more of the distributor defendants shall maintain exchanges.

The Administrator shall establish and maintain a panel of not less than ten arbitrators for each Arbitration Tribunal and shall establish and maintain suitable offices and personnel, including a clerk, for each Arbitration Tribunal and for the Appeal Board provided for hereinafter. The Administrator shall have the power to appoint and remove members of the panels and personnel.

3. No person shall be appointed a member of any panel of arbitrators who has any financial interest in, or has or has had any connection with the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre as landlord, lessor, or otherwise.

4. The American Arbitration Association is appointed Administrator of the arbitration system under this decree, and is authorized and directed to perform the duties and functions of such Administrator until further order of the Court.

Any successor to the American Arbitration Association as Administrator shall be appointed by the Court on the joint application and recommendation of the Petitioner and of a majority of the distributor defendants, except that if the Petitioner and a majority of the distributor defendants fail to join in making such application and recommendation the successor Administrator shall be appointed by the Court.

5. There shall be a Budget Committee consisting of three members, one of whom shall be appointed by the Admin-

istrator, one of whom shall be appointed by the distributor defendants, and one of whom shall be the Chairman of the Appeal Board. The Budget Committee shall budget the cost of the maintenance and operation of the arbitration system. Such budget for the first twelve months of the operation of the arbitration system shall not exceed four hundred ninety thousand dollars ($490,000.00), except with the consent of a majority of the distributor defendants. The budget for each succeeding twelve months period shall not exceed four hundred sixty-five thousand dollars ($465,000.00), except with the consent of a majority of the distributor defendants, provided, however, that the Court may, on the application of the Petitioner, and for good cause shown, order an increase in the budget for any year in such amount, not exceeding fifty thousand dollars ($50,000.00), as it may find necessary for the effective operation of the arbitration system.

6. Each arbitrator shall be selected and each arbitration proceeding shall be conducted in the manner prescribed by the Rules of Arbitration and Appeals which are filed herewith and are hereby approved. Such Rules may be amended or added to from time to time by the Administrator with the approval of a majority of the Appeal Board upon notice to the Petitioner and to the distributor defendants of such proposed amendments or additions and an opportunity for a hearing thereon. No amendment of or addition to such Rules shall change the qualifications of arbitrators as set forth in Rule II of such Rules or deny to any exhibitor or distributor defendant the right to intervene as a party in any proceeding by which it may be affected or deny to any party to an arbitration proceeding the right: to receive notice of all proceedings therein; to participate in the selection of arbitrators; to challenge the qualifications of arbitrators; to be represented by counsel or otherwise; to secure the production of witnesses and of evidence; to examine and cross-examine all witnesses; and to appeal to the Appeal Board from any adverse award. The Rules may provide for the arbitration of claims and controversies between distributor defendants and exhibitors other than claims or controversies referred to in subdivision 1 of this Section which by agreement

between the parties thereto shall be submitted to the tribunals.

7. There shall be an Appeal Board which shall have jurisdiction to determine appeals from awards made by the Arbitration Tribunals. It shall consist of three members appointed by the Court, each of whom shall be a person of known impartiality and distinction. Each such member shall be appointed for a term of three years and shall serve during such term unless he shall be removed by order of the Court or shall resign. Each member of the Appeal Board shall be eligible for re-appointment.

If any member of the Appeal Board is disqualified from passing upon any appeal, or is temporarily unable because of illness, absence or other cause to act as a member of the Appeal Board, the Court may on application of one or more members of the Appeal Board appoint another person of known impartiality and distinction to act as a temporary member of the Appeal Board in place of the member so disqualified or unable to act. The compensation of such temporary member shall be fixed by the Court.

One member of the Appeal Board shall be designated by the Court as the Chairman of the Board.

The members of the Appeal Board shall be compensated on an annual basis. The Chairman of the Board shall be paid twenty thousand dollars ($20,000.00) per annum, and each of the other members of the Board shall be paid seventeen thousand five hundred dollars ($17,500.00) per annum.

The Appeal Board shall have its offices in New York, New York.

8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Section IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. Such amounts shall be assessed by the Administrator to and shall be paid by the several distributor defendants in amounts proportionate to their re-

[fol. 168] spective gross receipts from licenses for the exhibition of motion pictures in the United States. The proportionate gross receipts of such defendants during the 1939-40 motion picture season shall be used in determining the amount to be paid by each such defendant for the expenses of establishing the arbitration system and of maintaining it during the first twelve months of its operation. Thereafter the gross receipts for the motion picture season ending on the August 31st immediately preceding the start of the particular twelve months period shall be used in determining such amounts.

Each distributor defendant shall inform the Administrator promptly after the end of each motion picture season of its total gross receipts during such motion picture season from licenses for the exhibition of motion pictures in the United States. Such information shall be treated by the Administrator as confidential and shall not be divulged except as required by law.

9. Any person who has the right to institute an arbitration proceeding under any provision of this decree or of any other decree referred to in subdivision 1 of this Section may institute and prosecute such proceeding in the manner and subject to the conditions specified in the Rules of Arbitration and Appeals, upon the condition that such person file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide in substance that such complainant submits the controversy to arbitration and undertakes to abide by and to comply fully with whatever final award may be entered therein.

Any exhibitor or distributor who intervenes as a party in any arbitration proceeding as provided in the Rules of Arbitration and Appeals, shall file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide, in substance, that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein.

Representatives of the Department of Justice, duly authorized in writing, shall be permitted reasonable access during regular office hours to all books, ledgers, accounts,

correspondence, memoranda and other records and documents in the possession or under the control of the Appeal Board, of the Arbitration Tribunal, and of the Administrator, which relate to the arbitration system and to the arbitration of claims and controversies under this decree.

XXIII.—Jurisdiction

Jurisdiction of this cause is retained for the purpose of:

(a) Enabling any of the parties to this decree to apply to the Court at any time for such orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of violations thereof;

(b) Enabling any of the parties to this decree to apply to the Court at any time for a modification of this decree in order to conform it to any Act of Congress enacted after the entry of this decree;

(c) Enabling any consenting defendant to make any application to the Court referred to in any provision of this decree;

(d) Enabling any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof;

(e) Enabling any consenting defendant to apply to the Court at any time more than three years after the date of the entry of this decree, to vacate this decree, or any modification thereof, or to vacate or modify any provision thereof, on the ground that under the economic or competitive conditions existing at the time of such application, this decree or any modification thereof, or any provision thereof, is inappropriate or unnecessary, or oppressive or unduly burdensome, regardless of whether or not such economic or competitive conditions are new or unforeseen. The right of each consenting defendant to make any such application and to obtain such relief is expressly reserved by them and is hereby expressly granted.

Whenever obligations or prohibitions are imposed upon the defendants by the laws of any State or by rules or regulations made pursuant thereto, with which the defendants by law must comply, the Court, upon application of the defendants, or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws, rules or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party to this decree under the provisions of this Section shall be made in open court upon notice to all of the other parties to this decree, and each such party, upon such application, shall have the right and privilege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

[fol. 169] RULES OF ARBITRATION AND APPEALS PURSUANT TO SUBDIVISION 6 OF SECTION XXII OF THE DECREE:

I.—Initiation of Arbitration

An arbitration proceeding shall be initiated by filing with the Clerk of the Tribunal having jurisdiction of the controversy a Demand for Arbitration and a submission as provided in subdivision 9 of Section XXII of the Decree, and by paying a filing fee of $10.00 to the Clerk of the Tribunal.

Filed herewith and made a part of these Rules is a map showing the territory throughout which each Arbitration Tribunal shall have jurisdiction (each of which territories is hereinafter called an Arbitration District), and the city in each such Arbitration District in which the Arbitration Tribunal shall be located. The Tribunal having jurisdiction in a particular proceeding shall be the Tribunal maintained pursuant to Section XXII of the Decree in the Arbitration District in which the complainant's theatre is located, except that when a distributor institutes an arbi-

tration proceeding the Tribunal having jurisdiction shall be the Tribunal in the Arbitration District in which the theatre involved is located.

The Demand for Arbitration shall be signed by the complainant and shall set forth:

The name and address of the complaining party; the name and address of each theatre involved in the controversy; the name and address of each exhibitor or distributor against whom complaint is made (hereafter sometimes referred to as a defending party); the name and address of each other exhibitor and distributor whose business or property it is believed by the complainant may be affected by an award in the proceeding; and a brief statement in simple language of the claim and the relief sought.

At the time of filing the Demand the complainant shall deliver to the Clerk of the Tribunal sufficient copies of the Demand to enable the Clerk to deliver one copy to each defending party and to each other exhibitor and distributor named in the Demand, and the Clerk shall forthwith make such delivery.

Within seven days after the date on which the Clerk of the Tribunal delivers a copy of the Demand to a defending party, such party may sign and file with the Clerk of the Tribunal a list giving the name and address of each exhibitor or distributor not named in the Demand whose business or property it is believed by such party may be affected by an award in the proceeding.

The Clerk of the Tribunal shall forthwith deliver a copy of the Demand to each exhibitor and distributor named in any list filed by a defending party.

Any exhibitor or distributor named either in the Demand or in any list filed by any defending party and any other exhibitor or distributor whose business or property may be affected by an award in the proceeding may, at any time prior to the commencement of the first hearing, intervene and thereby become a party to the proceeding by filing with the Clerk of the Tribunal a statement which shall set forth his interest as an intervenor in the proceeding and a submission as provided in subdivision 9 of Section XXII of the Decree and by paying a filing fee of $10.00 to the Clerk

of the Tribunal. The Clerk of the Tribunal shall forthwith deliver notice of each intervention to each other party to the proceeding.

Any party who intervenes more than fifteen days after the filing of the Demand shall not be entitled to participate in the selection of the arbitrator.

If, at any time after the fifteenth day following the filing of the Demand and prior to the appointment of an arbitrator, all parties to a proceeding who became parties, by intervention or otherwise, on or before said fifteenth day shall by written agreement select another Tribunal as the Tribunal having jurisdiction and file such agreement with the Clerk of the Tribunal originally having jurisdiction, jurisdiction of the proceeding shall thereby be transferred to the Tribunal so selected. Thereafter no further proceedings shall be had in the Tribunal originally having jurisdiction except that the Clerk thereof shall forthwith deliver notice of such transfer to the American Arbitration Association and shall forthwith deliver the entire file in such proceeding to the Clerk of the Tribunal so selected, who shall forthwith take the action prescribed in Rule III for the appointment of an Arbitrator from the Panel of Arbitrators for his Tribunal.

II.—Qualifications of Arbitrators

No person shall be appointed a member of a Panel of Arbitrators established in accordance with the Decree who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre, as landlord, lessor or otherwise.

No member of a Panel shall serve as an arbitrator in any proceeding if he has or has had any financial or other relations with any party to the proceeding, or has any interest in the result of the proceeding, or has any personal bias, which might prejudice the right of any party to a fair and impartial award.

III.—Appointment of Arbitrators

Not less than fifteen nor more than seventeen days after the filing of the Demand in accordance with Rule I, the

Clerk of the Tribunal shall deliver to each party an identical list of arbitrators selected from the Panel of Arbitrators, for the purpose of enabling the parties to indicate thereon their preference of arbitrators. If the Clerk of the Tribunal does not receive the list from any party within seven days after the delivery of the list to such party, all the names on such list shall be deemed acceptable to such party.

The Clerk of the Tribunal shall forthwith appoint an arbitrator from the names indicated as acceptable to all parties. In the event no name appears from the lists to be acceptable to all parties, or that none of those shown to be acceptable is available, the American Arbitration Association shall appoint an arbitrator from the remaining members of the Panel.

Not less than sixteen days after the filing of the Demand and prior to the appointment of an arbitrator, (or in the case of an arbitration of a controversy under either Section IV or Section VII of the Decree, at any time prior to the appointment of an arbitrator) the parties to any controversy may by written agreement unanimously appoint one or more arbitrators from the Panel of Arbitrators to arbitrate such controversy, by filing such agreement with the Clerk of the Tribunal.

No irregularity in the appointment of an arbitrator shall affect the validity of the proceeding or of the award.

Notice of appointment shall forthwith be given to the arbitrator by the Clerk of the Tribunal, and a signed acceptance obtained.

IV.—Removal of Arbitrator and Filling of Vacancy

Upon written application of any party prior to the date the arbitrator's award becomes final, the American Arbitration Association shall, upon proof satisfactory to it that an arbitrator is disqualified under Rule II, revoke the appointment of such arbitrator and declare the office vacant and the award, if any, vacated. No such action shall be taken by the American Arbitration Association in any case where an award has been made unless the applicant party shall have given five days notice of its application to all other parties. Unless application for disqualifica-

tion is made immediately following a party's discovery of the reason therefor, such party shall be deemed to have waived such disqualification.

The American Arbitration Association also may revoke the appointment of an arbitrator at any time by reason of his neglect, refusal or failure to perform the duties of his office.

If the appointment of an arbitrator is revoked, or if by reason of resignation, death or illness an arbitrator is unable to perform the duties of his office, a new arbitrator shall forthwith be appointed by the Clerk of the Tribunal from among the names acceptable to the parties or by the American Arbitration Association, in accordance with the second paragraph of Rule III.

V.—Hearings

Hearings shall be held at the office of the Arbitration Tribunal having jurisdiction of the controversy involved or at such other place in the same Arbitration District as [fol. 170] may be agreed upon by the parties with the consent of the arbitrator.

Hearings shall commence as promptly as possible after the appointment of the arbitrator.

The arbitrator shall fix the time of the beginning of the hearing and may adjourn the hearing from time to time.

The Clerk of the Tribunal shall deliver to the parties written notice of the name of the arbitrator and of the time and place of the beginning of the hearing at least five days prior thereto, unless such notice is waived by the parties.

VI.—Procedure at Hearings

The arbitrator shall take the oath of office in the form prescribed by the Administrator before commencing the hearing.

Parties may be represented by counsel or by others.

Each party shall have the right to examine or cross-examine all witnesses.

Witnesses shall testify under oath or its legal equivalent.

Evidence shall be received only at hearings of which all parties shall have had due notice and the arbitrator in

making his award shall consider only evidence so received and such inspections as he may make hereunder.

The arbitrator shall have power to require any party to produce such records or documents as the arbitrator may deem necessary to a proper determination of the controversy. In lieu of producing or offering original records or documents, any party may, with the approval of the arbitrator, produce or offer sworn copies thereof or sworn excerpts of the relevant or material portions thereof. If any party challenges the authenticity, correctness or adequacy of such documents or excerpts, the arbitrator shall determine such authenticity, correctness or adequacy. All exhibits offered in evidence shall be numbered and so marked as to indicate whether or not they were received.

The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

Whenever the arbitrator deems it necessary he may make an inspection in connection with the subject matter of the controversy upon notice to the parties.

The arbitrator may hear argument and receive briefs.

VII.—Closing and Reopening the Proceeding

After all parties have indicated that they have no further evidence to offer, the arbitrator shall declare the proceeding closed.

Prior to the expiration of the time for making an award the arbitrator may reopen the proceeding upon his own initiative, or for good cause upon the written application of any party on five days notice to all other parties.

At any time within twenty days after the award has been filed the arbitrator may also reopen the proceeding for the purpose of correcting inadvertent errors in the award.

VIII.—Defaults and Withdrawals

If any party to a proceeding defaults by failure to comply with the fourth paragraph of Rule XI or withdraws from the proceeding after an arbitrator is appointed, the proceeding shall nevertheless continue to an award unless all other parties to the proceeding consent to a dismissal. A party who defaults or withdraws shall not be entitled

to participate further in the proceeding but shall be bound by the award.

IX.—Powers of Arbitrators

The arbitrator shall have the powers and shall perform the duties granted to and imposed upon him by the Decree and these Rules, and in making his award he shall comply with the Decree and these Rules.

X.—Awards

The award shall be filed with the Clerk of the Tribunal within thirty days from the date of closing the proceeding, or from the date fixed by the arbitrator for the filing of briefs, whichever is later.

The award shall be specific, shall contain such findings as are required by the Decree and shall be signed by the arbitrator and acknowledged before a notary public or other officer duly authorized to administer oaths.

In his award the arbitrator shall assess costs against the losing party or parties or apportion them among the parties as he may deem proper. Costs shall be limited to the arbitrator's fee and the filing fees.

The Clerk of the Tribunal shall forthwith deliver a copy of the award and any corrected award to each party, with the date of filing endorsed thereon.

The award, or, if corrected, the corrected award, shall become final and binding upon the parties upon the expiration of the time for filing a notice of appeal therefrom, unless an appeal is taken in accordance with these Rules.

XI.—Arbitrator's Fees.

The American Arbitration Association shall fix for each Arbitration District the per diem rate of the arbitrator's fee, which in no event shall exceed $50.00 per diem. The arbitrator shall be entitled to the per diem fee for each day or part thereof that he shall attend a hearing or make an inspection.

Any expenses incurred by an arbitrator in making inspections as provided in Rule VI, and in conducting hearings at other places than the Tribunal office as provided in Rule V, shall be borne equally by the parties.

No other compensation of expenses and no gratuities or benefits of any kind shall be paid to or conferred upon an arbitrator by any party.

Prior to the commencement of each day's hearing or inspection, each party to the proceeding shall deposit with the Clerk of the Tribunal a sum equal to the arbitrator's per diem fee. Failure to make such deposit shall constitute a default.

After the award is filed, the arbitrator shall be paid his fee out of the sums deposited by the parties to the proceeding. The Clerk of the Tribunal shall return any undisbursed sums to the parties entitled thereto upon the final disposition of the controversy.

XII.—Stenographic Cost [1]

The Clerk of the Tribunal shall make the necessary arrangements for the taking of a stenographic record of the testimony when such a record is requested by one or more of the parties, who shall deposit the cost thereof with the Clerk of the Tribunal.

Any party desiring a transcript of the stenographic record of the hearing shall pay the cost thereof and in the event that such party did not pay the cost of taking the stenographic record it shall reimburse the other party or parties for the cost thereof.

XIII.—Extensions of Time

The parties may in writing unanimously agree to extend the time specified in any of the foregoing Rules and, except as to Rule X, the arbitrator may extend such time upon the written application of any party upon five days notice to all other parties.

XIV.—Notice of Appeal

Any party to a proceeding may appeal from an award by filing a notice of appeal with, and paying a filing fee of $25.00 to, the Clerk of the Tribunal in which the award

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[1] Under Rule XIV no appeal can be taken unless three copies of the transcript of the record or an abbreviation thereof are filed with the Clerk of the Tribunal.

was made, not later than twenty days after the date of filing of the award or the corrected award. The Clerk of the Tribunal shall forthwith deliver a copy of the notice of appeal with the date of filing endorsed thereon to each party to the proceeding and to the Clerk of the Appeal Board.

The appellant shall have made at his own expense, and, within ten days after filing the notice of appeal, shall file with the Clerk of the Tribunal in which the award was made, three copies of the transcript of the stenographic record of the hearing or such abbreviation thereof as may be agreed upon by the parties.

XV.—Record on Appeal

Upon receipt of the three copies of the transcript or an agreed abbreviation thereof filed by the appellant, the Clerk of the Tribunal shall forthwith prepare the record on appeal which shall consist of the following:

1. The Demand for Arbitration and the submission.
2. Statements and submissions of intervening parties.
3. Notice of appointment and signed acceptance of the arbitrator.
4. Clerk's record of hearing.
5. Three copies of the transcript of the stenographic record of hearing or such abbreviation thereof as may have been agreed upon by the parties.
6. Exhibits received in evidence and exhibits offered but not received in evidence, except such as may be omitted by stipulation of the parties.
7. The award.

Unless otherwise directed by the Appeal Board, the record on appeal shall remain on file in the Tribunal until the expiration of the time for filing of all briefs as provided in Rule XVI.

Immediately upon the expiration of such time the Clerk of the Tribunal shall transmit the record on appeal to the Clerk of the Appeal Board.

[fols. 171-174] XVI.—Proceedings on Appeal

Within thirty days after the filing of the notice of appeal, each party shall deliver a copy of his brief on appeal to every other party and file with the Clerk of the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Within forty days after the filing of the notice of appeal, each party shall deliver a copy of any answering brief to each other party and file with the Clerk of the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Upon the written agreement of all parties the Appeal Board shall, and upon its own initiative may, order oral argument. At any time not later than five days after the expiration of the time for filing answering briefs any party may apply to the Appeal Board for permission to present oral argument. Such application shall be in writing, shall state the reasons therefor and shall be filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party. Any objection to such application shall be made in writing and filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party, within five days after the filing of the application. The ruling on such application shall be made by the Appeal Board forthwith after the expiration of the five day period allowed for the filing of objections and a copy of the ruling shall forthwith be delivered by the Clerk of the Appeal Board to all parties.

When the Appeal Board has ordered oral argument it shall fix the date thereof. The Clerk of the Appeal Board shall deliver to the parties notice in writing of the time and place of such argument, at least ten days prior thereto.

Oral arguments shall be heard by the Appeal Board only in New York, New York.

XVII.—Decision and Opinion of the Appeal Board

All members of the Appeal Board shall pass on all appeals and, except as provided in Rule XIX, on all other matters, and the concurrence of two shall be necessary to a decision.

The decision of the Appeal Board together with an opinion stating the reasons therefor shall be in writing and signed by the members of the Appeal Board or a majority thereof. The decision shall be acknowledged before a notary public or other officer duly authorized to administer oaths. The decision and opinion shall be filed with the Clerk of the Appeal Board, who shall forthwith file a copy thereof with the Clerk of the Tribunal and shall forthwith deliver a copy thereof to each of the parties. The Clerk of the Tribunal shall forthwith notify each of the parties of the date of filing with him.

The Appeal Board in its decision may affirm, modify, correct or reverse the award of the arbitrator, including provision for costs therein, or may remand the proceeding to the Tribunal for a rehearing or for further action in accordance with the decision of the Appeal Board.

The Appeal Board in its decision may assess the cost of the stenographic record and of the transcript thereof against the losing party or parties, or apportion it among the parties as it deems proper.

XVIII.—Proceedings Subsequent to Decision of Appeal Board

Unless the Appeal Board remands the proceeding to the Tribunal or reopens the proceeding as hereinafter provided, the decision of the Appeal Board shall become the final award and shall become binding on all parties ten days after it is filed with the Clerk of the Tribunal.

When the Appeal Board remands a proceeding the arbitration shall thereupon proceed in accordance with the decision of the Appeal Board.

Within ten days after the decision of the Appeal Board has been filed with the Clerk of the Tribunal the Appeal Board may reopen the proceeding for the purpose of correcting inadvertent errors. In such case the corrected decision shall be signed and acknowledged and copies thereof shall be delivered and filed as provided in Rule XVII. Such corrected decision, unless it remands the proceeding to the Tribunal, shall become the final award and shall become binding on all parties when it is filed with the Clerk of the Tribunal, or ten days after the decision cor-

rected thereby was filed with the Clerk of the Tribunal whichever is later.

XIX.—Extension of Time

The parties may by written agreement extend the time specified in any of the Rules relating to appeals, and any member of the Appeal Board may do so upon the written application of any party made upon five days notice to all other parties.

XX.—Submission of Other Controversies

Controversies between exhibitors and distributors other than those referred to in subdivision 1 of Section XXII of the Decree may be submitted to the arbitration system by the parties thereto, provided:

(a) At least one of the parties thereto is a distributor defendant as defined in the Decree; and

(b) A submission in writing setting forth the controversy to be arbitrated is signed by all the parties thereto and filed with the Clerk of the Tribunal having jurisdiction.

These rules in so far as they are applicable shall apply to the arbitration of such controversies except as the submission may otherwise provide and except that no exhibitor or distributor may intervene therein.

XXI.—Access to Records

At no time shall access to the record of any proceeding or appeal be permitted to any person not a party, except that awards, decisions and opinions may be made public.

XXII.—Definitions

"Decree" means the Consent Decree dated November 20, 1940, entered in the District Court of the United States for the Southern District of New York in an action entitled "United States of America v. Paramount Pictures, Inc., et al."

"Arbitration Tribunal" and "Tribunal" mean the Tribunal established by the American Arbitration Association in any city as provided in the Decree.

"Clerk of the Tribunal" means the Clerk of the Arbitration Tribunal having jurisdiction.

"File with the Clerk" means actual receipt by the Clerk.

"Deliver" or "Delivery" means either personal delivery or the placing of the documents in the mails properly stamped and addressed to the person intended to receive such document.

"Proof of Delivery" means an admission of delivery or an affidavit of personal delivery or of mailing.

"Award" means award and findings.

"Person" means any individual, partnership, unincorporated association or corporation.

[fol. 175] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR MODIFICATION OF DECREE

The United States of America, plaintiff herein, hereby applies to the court for modification of the consent decree heretofore entered herein on November 20, 1940, pursuant to section XXIII thereof, in the manner hereinafter set forth for the reasons set forth in paragraph 1 hereof.

1. Sections III and IV (a) of said decree have been inoperative since September 1, 1942, and the restraining provisions of Section XI of said decree have been inoperative since November 20, 1943. Said decree is now inadequate to perform its intended function of restraining the violations of law alleged in the complaint and conforming the operation of the decree defendants [1] to the requirements of the Sherman Act. Plaintiff respectfully submits that in order to perform said function said decree should be modified in the respects set forth in the following paragraphs. Where no mention is made of an existing section, no change is requested. As to section III, no change

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[1] The term "decree defendants" as used herein refers to all of the parties which consented to the decree entered herein on November 20, 1943.

in the form thereof is requested but plaintiff prays that said section may again be made operative.

[fol. 176] 2. Plaintiff prays that subsection (a) of section IV of the decree be stricken therefrom and that the following subsection (a) be substituted therefor:

> No distributor defendant shall condition the licensing of one feature or group of features upon the licensing of another feature or group of features.

Plaintiff further prays that the last two paragraphs of subsection (b) of section IV, which appear on pages 6 and 7 of the decree, be stricken therefrom. Said section IV, if modified as prayed herein, would read as follows:

> (a) No distributor defendant shall condition the licensing of one feature or group of features upon the licensing of another feature or group of features.
>
> (b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license re-issues, westerns,[1] or foreigns[2] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

3. Plaintiff prays that section V of the decree be stricken therefrom and that the following section V be substituted therefor:

> (a) No decree defendant shall condition the licensing of films in one theatre or group of theatres upon the

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[1] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[2] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

licensing of films in another theatre or group of theatres.

[fol. 177] 4. Plaintiff prays that section VIII of the decree be modified by striking therefrom the sentence, "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures" and substitute therefor the following sentence: "Clearance shall be deemed to be unreasonable whenever its effect is to restrain competition between two or more theatres unreasonably."; by adding the following clause to the provisions defining the power of the arbitrator: "An award providing that a theatre holding clearance found to be unreasonable should take no clearance over the complainant's theatre may be made regardless of whether or not there is substantial competition between said theatres."; and by striking the following two provisions:

> Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree.
>
> Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Said section VIII, if modified as prayed herein, would read as follows:

> Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:
>
> Clearance shall be deemed to be unreasonable whenever its effect is to restrain competition between two or more theatres unreasonably.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein theatres involved are located;

(2) The admission prices of the theatres involved;

[fol. 178] (3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. An award providing that a theatre holding clearance found to be unreasonable should take no clearance over the complainant's theatre may be made regardless of whether or not there is substantial competition between said theatres.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed

as to warrant modification, and, in the event that the arbitrator finds that there has been such change, he shall make a redetermination of the maximum clearance.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature, provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

5. Plaintiff prays that sections IX and X of the decree be stricken therefrom and that the following section be substituted therefor.

[fol. 179] No distributor defendant shall license or make available for exhibition in theatres any films released by it upon terms which have the effect of unreasonably restraining competition between two or more theatres in exhibiting said films. Controversies arising on a complaint by an exhibitor thereby affected that a distributor has so licensed or made available such films for exhibition in the complainant's theatre or in a theatre competing with his theatre shall be subject to arbitration in accordance with the terms of this decree. If the arbitrator finds that this section has been violated, he shall make an award which will describe the specific course of conduct found by him to violate this section and will require the payment of an amount by such defendant or defendants as he finds have engaged in such conduct which in his judgment will compensate the complainant for any pecuniary loss sustained as the result of such a violation or violations and discourage the recurrence of such violations.

6. Plaintiff prays that section XI of said decree be stricken therefrom and that the following section be substituted therefor:

> (a) No decree defendant shall hereafter acquire, directly or indirectly, any financial interest in any theatre.
>
> (b) Each decree defendant which is directly or indirectly engaged in the production, distribution and exhibition of films shall within three years from the date of this modification completely divorce its exhibition business from its production and distribution business to the end that no defendant directly or indirectly engaged in producing or distributing films shall then own any financial interest in theatres and no defendant directly or indirectly engaged in operating [fol. 180] theatres shall then own any interest in the production or distribution of films.
>
> (c) Each decree defendant directly or indirectly engaged in operating theatres shall within such time and upon such terms as the court may deem reasonable divest itself of such theatre interests as the court may in the course of supplemental proceedings hereunder, find should be divested in order to insure theatre operating competition in the communities where they are now monopolizing theatre operation.
>
> (d) All of the theatre-operating agreements, implied or expressed, by which any two or more of the decree defendants share in the financial benefits from the operation of theatres jointly owned or controlled by any two or more of them are hereby declared void, and each decree defendant is enjoined from entering into or enforcing any similar agreements.

7. Plaintiff prays that section XII of the decree may be stricken therefrom.

8. Plaintiff prays that section XV of the decree may be stricken therefrom and that the following section be substituted therefor:

> All franchises and any licenses entered into pursuant thereto by any of the decree defendants are hereby declared illegal and void and the said defend-

ants are hereby enjoined from making or enforcing any similar agreements.

9. Plaintiff prays that section XVII of the decree may be stricken therefrom and that the following section be substituted therefor:

[fol. 181] No distributor defendant shall license its films to any affiliated theatre upon terms which unreasonably restrain the ability of an unaffiliated theatre to compete with such affiliated theatre.[1]

10. Plaintiff prays that section XX of the decree may be stricken therefrom.

11. Plaintiff prays that section XXI of the decree may be stricken therefrom.

Attached hereto is a copy of the proposed modified decree with the sections thereof renumbered to conform to the omissions proposed herein.

United States of America, by Robert L. Wright, Special Assistant to the Attorney General.

Francis Biddle, Attorney General.
Wendell Berge, Assistant Attorney General.
James B. M. McNally, United States Attorney.

[fol. 182] In United States District Court

[Title omitted]

Findings of Fact—December 31, 1940

1. The following are definitions of terms used in these findings and in the judgment to be entered hereon:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon con-
[fol. 183] dition that the exhibitor shall also license an-

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[1] For the purposes of this section an affiliated theatre is one in which a distributor defendant owns, directly or indirectly, a financial interest. All other theatres are unaffiliated.

other feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

[fol. 184] *Road-show*—A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a feature in a given area, first-run being the first exhibition in that

area, second run being the next subsequent, and so on, and shall include also successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

Trade-Showing—A private exhibition of a feature prior to its release for public exhibition.

2. Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. In 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. Although this corporation was initially organized to function as a film buying combine, it evolved into a film producing company first by financing the production of pictures by others for exhibition in the theatres of its members and finally by producing its own motion pictures.

[fol. 185] 5. The members of this First National group, consisting of many of the most important exhibitors in the United States controlling many of the best theatres, became franchise holders of the distributing company which they formed. They acquired not only the right to exhibit in their own theatres the pictures produced and distributed by First National, but also they each obtained the right to subfranchise other exhibitors in their respective territories. In a short time there were some 3500 franchise holders, representing as many or more theatres.

6. First National soon began to negotiate for the services of well-known stars and directors in the employ of other producers, including Paramount, and the members of First National began to refuse to exhibit Paramount

Films. Such well known stars as Mary Pickford and Norma Talmadge went over to the First National Group.

7. Many of the theatres owned by members of First National had, for a long time prior to 1918, exhibited Paramount pictures. The formation and growth of First National gradually cut down the number of Paramount pictures exhibited in the theatres of the First National group. By 1919 Paramount faced a situation where a group of owners of many of the best theatres in the large cities, many of whom had been its customers in the past, had combined together for co-operative buying and had expanded into a strong organization which distributed its own pictures and threatened to supply its members with enough pictures to permit them to operate without using any pictures of other producers, including Paramount.

8. In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions. Prior to the fall of 1917 Paramount had no theatre interests. Between 1917 and 1919 it acquired an interest in two theatres in New York City as show windows, to replace the Strand Theatre which had gone over to the First National Group. [fol. 186] During that year in conjunction with its representatives in the South, it formed Southern Enterprises, Inc., which acquired various theatres in the South. At about the same time Paramount acquired a 50% interest in the Black chain of theatres in New England.

9. In January, 1932, Paramount went into equity receivership in the United States District Court for the Southern District of New York. It stayed in equity receivership until March, 1933, when it went into voluntary bankruptcy. It remained in bankruptcy until June, 1934, when upon passage of Section 77B of the Bankruptcy Law, it petitioned for reorganization. It was finally reorganized under its present name in June, 1935. During these years various companies operating theatres in which Paramount was interested were themselves the subject of bankruptcy or receivership proceedings.

10. Some of the theatre interests which Paramount held at the time of the trial of this action had been acquired and were wholly owned by it either directly or indirectly through subsidiary companies prior to its bankruptcy and

reorganization. In the course of its reorganization, some of its partly owned theatre interests were created, i.e., in some instances the plan of reorganization approved by this court provided for the sale or other disposition by Paramount of a partial interest (sometimes amounting to 50%, sometimes more and sometimes less) in theretofore wholly owned theatre operating companies, or companies holding legal or equitable interests in theatres or theatre operating companies. The result was the creation of many of Paramount's present partly owned theatre interests.

11. In the course of the reorganization proceedings Paramount lost its interests in some theatres and also changed its relationship with respect to interests in some of its the- [fol. 187] atre operating companies. The effect of these proceedings and the policy of decentralization inaugurated in the course thereof, was that in some instances Paramount disposed of a partial interest in companies theretofore wholly owned.

12. Loew's Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

13. Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

14. RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

15. Keith-Albee-Orpheum Corporation was a corporation organized and existing under the laws of the State of Dela-

ware, with a place of business at 1270 Sixth Avenue, New York, New York, and was engaged in the business of exhibiting motion pictures prior to its dissolution on September 29, 1944. Approximately 99% of its common stock and 33% of its preferred stock were held by Radio-Keith-Orpheum Corporation.

[fol. 188] RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

17. RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

18. RKO was organized in 1928 by Radio Corporation of America largely for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices in the motion picture production and exhibition fields.

19. At the time of its organization, RKO secured production and distribution facilities by merger with a small company, FBO Productions, Inc., which had limited production facilities and a national distributing organization. RKO invested substantial sums to modernize these facilities.

20. The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures.

21. During its initial organizational period, RKO acquired interests in a number of companies operating circuits of vaudeville theatres.

22. RKO went into receivership in 1933 and continued in receivership and reorganization until 1940. At the time of its receivership RKO operated considerably more theatres [fol. 189] than its present total of 106. During the receivership it lost 57 theatres.

23. The organization of RKO did increase competition in each of the three branches of the industry.

24. Warner Bros. Pictures, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

25. On April 4, 1923, the four Warner brothers, Harry M., Jack L., Albert, and Sam, transferred their business of production and distribution of motion pictures to a corporation known as Warner Bros. Pictures, Inc. (hereinafter referred to as Warner).

26. Beginning in 1925, Warner began the work of developing sound pictures under license and agreements from Western Electric, culminating in the production of such sound pictures as "The Jazz Singer", starring Al Jolson, in October, 1927, and the first 100% talking picture "The Lights of New York" in the summer of 1928.

27. The Stanley Company of America had in 1928 and for a year prior thereto about 250 theatres situated principally in and around Pennsylvania and New Jersey.

28. Negotiations were begun with the view of exchanging stock of Warner for the stock of Stanley Company of America. This transaction was consummated late in 1928.

29. With the acquisition of the stock of Stanley Company of America, Warner acquired 250 theatres which could be immediately equipped with sound installation.

[fol. 190] 30. In the year and nine months immediately following the acquisition of the stock of Stanley Company of America Warner secured in a similar fashion several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country.

31. In 1931 Warner had an interest in 591 theatres, the largest number of theatres in which Warner has ever had an interest.

32. Today, the Warner companies have an interest in 547 theatres—a net reduction of 44 from its peak holdings of 591 in 1931.

33. First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures

had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the basis of acquiring film of first quality for exhibition in their own theatres, as well as for distribution by them for other theatres in the respective territories in which they operated.

34. In 1928 Stanley Company of America owned 1/3 of the stock of First National Pictures, Inc., all the stock of First National Pictures, Inc. being subject to a voting trust.

35. Warner acquired as part of the Stanley Company of America transaction in 1928, 1/3 of the stock of First National Pictures, Inc.

36. At or about the time of the acquisition of the Stanley Company of America stock, or shortly thereafter, Warner purchased another 1/3 of the stock of First National Pictures, Inc. from other First National Pictures, Inc. stockholders.

[fol. 191] 37. Subsequently, in 1929, Warner acquired the remaining 1/3 of the stock of First National Pictures, Inc. from defendant, Twentieth Century-Fox.

38. Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures. On July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation.

39. Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

40. Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

41. Twentieth Century-Fox produces its features in its own studio in Los Angeles, California, distributes them in this country through thirty-one branches or exchanges which it operates in the principal centers of population, and licenses its features for exhibition in its own and other theatres.

42. Twentieth Century-Fox acquired its initial interest in theatres through the purchase of stock in corporations then engaged in operating theatres. Since such original [fol. 192] acquisition, it has acquired additional interests in theatres, some of which were acquired in competition with other defendants and with independent circuits and some of which are new theatres constructed by it.

43. National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth-Century-Fox Film Corporation.

44. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

45. Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

46. Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

47. Universal Corporation is a corporation organized and existing under the laws of the State of Delaware, with

its principal place of business at 1250 Sixth Avenue, New [fol. 193] York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries. On May 25, 1943, its name was changed to Universal Pictures Company, Inc., when a subsidiary of the same name was merged into it, but Universal Corporation was the surviving corporation.

48. The corporation named in the complaint as Universal Pictures Company, Inc. was a subsidiary corporation controlled by Universal Corporation, which was engaged in the business of producing motion pictures, prior to its merger into Universal Corporation on May 25, 1943.

49. Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

50. The Universal group of defendants at the time of the trial consisted of the following corporations: (1) Universal Pictures Company, Inc. (hereinafter sometimes called Universal Pictures), a Delaware Corporation with its principal office in New York, N. Y., engaged in the business of producing motion pictures and distributing the same through wholly-owned subsidiaries; (2) Universal Film Exchanges, Inc. (hereinafter sometimes called Universal Film Exchanges), a Delaware corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the United States (except for the Metropolitan District of New York City), a wholly-owned subsidiary of Universal Pictures; (3) Big U Film Exchange, Inc. (hereinafter sometimes called Big U), a New York corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the Metropolitan District of New York [fol. 194] City, a wholly-owned subsidiary of Universal Pictures. The term "Universal" as used herein means any or all of the Universal defendants.

51. Prior to May 25, 1943, the name of Universal Pic-

tures Company, Inc. was Universal Corporation, incorporated in Delaware in 1936. It owned approximately 99% of the outstanding common stock of a Delaware corporation which was incorporated in the year 1925 and was also known as Universal Pictures Company, Inc. Said corporation last-named had its principal office in New York, N. Y., and was engaged in the business of producing motion pictures and distributing the same through its subsidiaries. It owned all of the outstanding stock of Universal Film Exchange Inc. and 20% of the outstanding common stock of Big U Film Exchange Inc. The other 80% of said stock was owned by Universal Corporation. On May 25, 1943, Universal Pictures Company, Inc. (Delaware, 1925) was merged into Universal Corporation (the surviving corporation), and the name of the surviving corporation was changed to Universal Pictures Company, Inc.

52. Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

53. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

54. During the entire period in question United Artists Corporation distributed photoplays in the United States of [fol. 195] America that were produced by David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Nebenzal, Jules Levey, David Loew, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennet, Howard Hughes, Preston Sturgis, J. Arthur Rank, Edward Golden, or corporations with which the aforesaid individuals were associated and other independent producers.

55. United Artists Corporation maintains 26 branches

or exchanges located throughout the United States, and through these facilities it distributes and has distributed all of the product handled by it during the period in question.

56. Paramount Pictures, Inc.; Loew's Incorporated; Radio-Keith-Orpheum Corporation; Warner Bros. Pictures, Inc.; and Twentieth Century Fox Film Corporation and their respective distribution and exhibition subsidiaries are the five major defendants.

57. As between the eight defendants, Paramount, Loew's, Fox, RKO, Warner, Columbia, United Artists and Universal, there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants.

58. Neither of the defendants Columbia, Universal and United Artists owns any theatres.

59. There exists active competition among the defendants and others in the production of motion pictures.

60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures. [fol. 196] 61. In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed.

62. In licensing features, each of the distributor defendants has agreed with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed.

63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor.

64. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for infraction. In the case of such exceptional

features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised.

65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States.

66. All of the five major defendants have a definite interest in keeping up prices in any given territory in which [fol. 197] they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas. Even if the licenses were at flat rate, a failure to require their licensees to maintain fixed prices would leave them free for lowering the current charge to decrease through competition the income to the licensor on theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas. There exists great similarity, and in many cases identity, in the minimum prices fixed for the same theatres in the licenses of all of the defendants.

67. The major defendants made operating agreements as exhibitors with each other and with independent exhibitors in which joint operation of certain theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein or are to be jointly determined by other means. These agreements show the express intent of the major defendants to maintain prices at artificial levels.

68. Certain master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area in the United States.

69. Licenses granted by one defendant to another disclose the same inter-relationship among the defendants. Each of the five major defendants as an exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum admission prices. RKO, Loew's, Warner, Paramount, and Fox, in granting and accepting licenses with minimum admission prices specified, have among themselves engaged in a national system to fix prices, and Columbia, Universal, and United Artists, in requiring the maintenance of mini- [fol. 198] mum admission prices in their licenses granted to these exhibitor-defendants, have participated in that system.

70. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices.

71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected.

72. The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason

for this is that if 10,000 people of a city's population are ultimately to see the feature—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it [fol. 199] in the higher priced prior-run theatres. In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible.

73. Among the provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain feature motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways; in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearances as fixed by other distributors; or in terms of combinations of these formulae.

74. The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at a lower than prior rates.

77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensor in the rental to be derived from the [fol. 200] exhibition of the feature licensed, without unreasonably interfering with the interest of the public.

78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.

79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents.

80. Some licenses granted clearance to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement.

81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres in which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system.

82. The defendants have acted in concert in their grant of run and clearance.

83. Clearances are given to protect a particular run against a subsequent run and the practice of clearance is so closely allied with that of run as to make findings on [fol. 201] the one applicable to the other.

84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures.

85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size,

location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license. Thus, price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated.

86. Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the feature in their several areas, seriously and unreasonably restrain competition.

87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any "formula deal" license agreements.

[fol. 202] 88. Master agreements which cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion, have been entered into by the distributor defendants and unreasonably restrain trade.

89. Franchises have been entered into by the distributor defendants, and unreasonably restrain trade because they cover too long a period (more than one season), and also because they embrace all the features released by a given distributor.

90. Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest, and Loew's is not currently granting franchises. During its entire history Loew's, as a distributor, granted a total of 213 franchises, of which 154 were to independent theatres and only 59 to those in which any other producer-exhibitor had an interest.

91. Twentieth Century-Fox has not granted any franchise since June 6, 1940. In 1938-39, the motion picture season in which Twentieth Century-Fox had the greatest number of franchises outstanding, there were 400. Of these, 361 were with independent exhibitors.

92. During the period in question Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors.

93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits.

94. For many years the distributor defendants, except United Artists Corporation, licensed their films in "blocks", or indivisible groups, before they had been [fol. 203] actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block booking and blind-selling based upon the supposed unfairness of contracts which often includes pictures the inferior quality of which could not be known, Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five, however, could be licensed where the contents of any kind had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre.

97. Blind-selling is a practice whereby a distributor li-

censes a feature before the exhibitor is afforded an opportunity to view it.

98. Since the consent decree of November 20, 1940, the five major defendants have given each exhibitor, whether a defendant or independent, an opportunity at trade shows [fol. 204] to view each feature before licensing it. In general, trade shows, which are designed to prevent blind-selling, are poorly attended by exhibitors.

99. During the 1943-44 season, the number of features distributed by eight distributor-defendants and the three other national distributors were as follows:

Distributor-defendants	No. of Films	Percentages of Total With "Westerns" Included	Percentages of Total With "Westerns" Excluded
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Sub-total	260		
Other National Distributors			
Republic (29 features, 30 "Westerns")		14.86%	8.66%
Monogram (26 features, 16 "Westerns")		10.58%	7.76%
PRC (20 features, 16 "Westerns")		9.07%	5.97%
		100%	100%
Sub-Total 137	397		
Total without "Westerns"	335		

100. The percentage of features on the market which any of the five major defendants could play in its own theatres would be relatively small and in no-wise approximates a monopoly of film exhibition.

[fol. 205] 101. Continuously since its organization RKO has distributed features for independent producers. The particular independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of

features was derived from such independently produced features.

102. It would be financially impossible for RKO to operate its theatres on features distributed by RKO alone.

103. Twentieth Century-Fox produced less than 9 per cent. of the total number of features nationally distributed in the United States during each year between 1936-37 and 1944-45.

104. Universal has customarily produced at its studios at Universal City, California, during each theatrical year (commencing on or about September 1st) between 45 and 50 feature-length motion picture photoplays, seven so-called Westerns, four Serials, 15 two-reel subjects, 30 single-reel subjects and 104 newsreels.

105. Said motion pictures were distributed by Universal and licensed for exhibition by motion picture theatres throughout the United States by means of a system of 31 exchanges located in various States in the United States, from the East Coast to the West Coast and from Canada to the Southern boundary. Universal also maintained a Home Office in the City of New York.

106. In marketing its motion pictures, Universal's usual and customary practice was to offer to license to exhibitors, by title and description as aforesaid, its entire line of pictures, consisting of feature-length motion picture photoplays, Westerns, short-subjects (consisting of serials and two-reel and one-reel pictures) and newsreels. In this way approximately 50 feature-length motion picture photoplays, a group of Westerns, short-subjects, two so-called "Special" photoplays, three features produced by independent [fol. 206] producers, and newsreels, were offered to exhibitors by Universal each year.

106A. During recent years, in excess of 600 feature-length motion-picture photoplays were released each year in the United States, exclusive of foreign-made films. Universal releases of feature-length photoplays, including Westerns and so-called Marquee pictures, during said period, equalled approximately 8% of the total number of feature-length photoplays released in the United States each year.

107. During the period in question, United Artists Cor-

poration distributed between 20 to 26 pictures a year when the corporation had a good year and has handled as low as 4 in distribution in a releasing season.

108. At no time during the period in question did United Artists distribute more than 5% of the feature photoplays American made and distributed in the United States of America and generally distributed less than 5% of such releases.

109. That in each distribution agreement with each producer using the facilities of United Artists for distribution among other things there appears substantially the following language:

> "United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United.
>
> "United shall use its best efforts to procure prices, license fees and rentals in a fair and open market reasonably satisfactory to the Producer.
>
> [fol. 207] "Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered hereunder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to include more than one motion picture on a contract, the Producer authorizes United to market its product in accordance with that custom. In no event, however, shall any motion picture of the Producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set out the respective license fees for each motion picture after the name of such motion picture.
>
> "United agrees upon the written direction of Pro-

ducer that United shall market wherever permissible the motion pictures designated by the Producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom.

"The Producer shall have the right to designate a representative for the territories hereinafter specified. The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	*Central Location*
United States and Canada	New York
British Isles	London
Australia	Sydney

"Producer agrees that such submission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

[fol. 208] "If the Producer has designated such a representative for any such territory, United shall submit for his approval or rejection each proposed written contract for the distributing, exhibiting or marketing of such Producer's motion pictures or any of them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

"Should the Producer or its representative reject any such proposed contract the Producer or its repre-

sentative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

"Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition or marketing of any motion picture in any specified theatre or situation, United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval."

110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers and extended runs; granting road-show privileges; allowing overage and underage; [fol. 209] granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of features for rental purposes. These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors.

111. The discrimination referred to in Finding 110 would appear to be impossible under a system where the exhibitors competing for a license to exhibit a given feature on

a given run do so on a parity since the same offer must be made to all pro-pective exhibitors in each competitive area.

112. Agreements were made by the exhibitor-defendants with each other and their affiliates by which given theatres of two or r ore exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the "pooled" theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages or otherwise. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". The result is to eliminate competition *pro tanto* both in exhibition and in distribution of features which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

113. Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their [fol. 210] more effective competition against theatres not members of the "pool".

114. In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres. This is but another means of carrying out the restraints found above.

115. Many theatres, or the corporations owning them, are held jointly by o e or more of the exhibitor-defendants, together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as an inconsequential investment in exhibition.

116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion

pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently.

117. Such joint interest as those described above in findings 112 through 116 exist in a great number of theatres, a summary of which is set forth in the following tabulation taken from RKO's Exhibit 11:

Theatres jointly owned with independents:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

[fol. 211]

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's RKO	3
Loew's Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following number will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres

Total affected by the decree according to RKO's Exhibit 11	1,292 Theatres

118. In the year 1945 there were about 18,076 motion picture theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35 percent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1,395—a little less than half, or about 7.72 percent; Warner 501, or about 2.77 percent; Loew's 135, or about .74 percent; Fox 636, or about 3.52 percent; and RKO 109, or about .60 percent. There were 361 theatres, or about 2.00 percent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same [fol. 212] corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owned an indirect minority stock interest. It includes all theatres in which each defendant otherwise owned a direct or indirect interest of any amount.

119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theater holdings alone the defendants do not and cannot collectively and individually, have a monopoly of exhibition.

120. On January 1, 1935, Loew's operated in the United States, 126 theatres. The first-run theatres, which are engaged to a large extent in exhibiting Loew's own product, Metro pictures, serve as "show-cases" for those pictures in the areas where the theatres are located.

121. The formation of RKO resulted in the conversion of vaudeville theatres acquired by it into motion picture theatres and thereby introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located.

122. Ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres.

123. The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed

subsequent run exhibitors in that area and success in [fol. 213] exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors.

124. Each of the five major defendants is able to coordinate the initial exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign.

125. Twentieth Century-Fox is interested in theatres in only 16 of the 92 cities having a population of over 100,000. In 12 of these 16 cities features of one or more defendants is licensed to independent first run exhibitors competing with Twentieth Century-Fox (New York, Seattle, Denver, Portland, Oakland, San Diego, Long Beach, Los Angeles, San Francisco, Spokane, Sacramento, and Kansas City, Kansas) as well as to other defendants having theatres in some of these cities. In three of the remaiinng four cities, there is also first-run competition from others of the defendants.

126. The 17.35% of theatres which comprise the five circuits of the major defendants pay from 35 to 54% of the total domestic film rental respectively received by the eight distributor defendants and 45% of the total domestic film rental received by all of said distributor-defendants. The five largest unaffiliated circuits together pay less than 5% of such rental.

127. The major defendants, as distributors, during the 1943-44 season, received from 71 to 81% of the film rental that was paid to all distributors by exhibitors affiliated with the five major defendants. The minor defendants received from 26 to 15% of such rental and the independent distributors from 2½ to 4½% of such rental.

128. During the 1943-44 season the eight distributor defendants received 45.2% of the total feature film rental, received by them, from theatres affiliated with the five [fol. 214] major defendants; and 54.8% of such rental from other exhibitors.

129. In some situations where Paramount had theatre interests, other defendant distributors licensed their features to competing theatres and not to the Paramount theatres, and in some cases the operating companies in which Paramount was interested were not able to obtain

the right to exhibit the features of some of the other defendant distributors.

130. Paramount features are licensed for exhibition in from 8,000 to 14,500 theatres in the United States annually. The number of licenses each year varies from feature to feature and from year to year.

131. In 21 of the 36 out of the 92 cities where Loew's operates theatres none of the other four producer-exhibitors licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers.

132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Loew's first-run houses, decreased from 1382 to 998 and the features of non theatre-owning distributors, increased from 1201 to 1879.

133. In 1935, the other four theatre-owning distributors earned $2,611,986 from Loew's theatres and the non theatre-owning distributors earned $2,205,330 ($406,656 less). In 1944, the non theatre-owning distributors earned $5,261,116 in Loew's theatres, which was $419,477 more than the $4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors.

[fol. 215] 134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non theatre-owning distributors, Columbia (8.3%), United Artists (8.3%) and Universal (7.4%), was higher than that paid to each of three producer-exhibitors, RKO (2.1%), Warner Bros. (2.1%) and Twentieth Century-Fox (6.1%).

135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was to Loew's itself for the exhibition of Loew's pictures, and 27.1% was to non-theatre-owning distributors. Thus a total of 75% of all firm rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors.

136. During the 1943-44 season RKO received 56.9% of its total license fees from independent theatres, 14.1% from its own theatres, and (in the aggregate) 29% from theatres affiliated with other defendants.

137. In the 1943-44 season, of the total number of exhibitions of features in first-run and metropolitan circuit run-theatres operated by RKO, 23.1% were exhibitions of features distributed by RKO, 29.6% were exhibitions of features distributed by other theatre-owning distributors, and 47.3% were exhibitions of features distributed by non-theatre-owning distributors.

138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61-6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants, about 14% from theatres in which it had an interest, about 13% from theatres in which Paramount had an interest, about 4% from theatres in which Twentieth Century-Fox had an interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest.

139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about 10% from Warner's own American theatres, and the [fol. 216] balance, about 16% from American theatres in which one or more of the defendants had an interest.

140. Not a single one of the Loew first run theatres in the 39 of the 92 largest cities where Loew operates or has an interest in first run theatres licensed a Warner feature for exhibition in the 1943-44 season. In the same season the Warner theatres regularly exhibited the Loew features in many of the 28 of the 92 largest cities where Warner operated or had an interest in first run theatres.

141. The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year.

142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants.

143. Between 1937 and 1944 the theatres in which Warner had an interest substantially decreased the amount of film rental paid to the 5 theatre owning defendants, and substantially increased film rental paid to the non-theatre owning defendants.

144. Of the total film revenue received by Twentieth Century-Fox in 1944 from all theatres in the United States, 60.8 per cent. was paid by exhibitors not defendants in this action; 14.1 per cent. was paid by its own theatres; 1.26 per cent. by Loew theatres; 5.52 per cent. by RKO theatres; 13.46 per cent. by theatres in which Paramount had an interest; and 4.82 per cent. by Warner theatres.

145. On January 1, 1935, there were 13,386 theatres operating in the United States. In 1945, there were 18,076 theatres operating in the United States.

[fol. 217] 146. In about 60 percent of the 92 cities having populations of over 100,000, there are independent first run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices found to have unreasonably restrained competition.

147. In about 91 per cent of the 92 cities with over 100,000 population, there is competition on first runs between independent theatres and theatres of one or more of the defendants, or among the defendants themselves, except so far as it may be restricted by the trade practices found to have unreasonably restrained competition. In the remainder of the 92 cities there is always competition in some run.

148. In the aforementioned 92 cities, at least 70% of all of the first run theatres are affiliated with one or more of the major defendants. In 4 of said cities there are no affiliated theatres. In 38 of said cities there are no independent first run theatres. In the remaining 50 cities the degree of first run competition varies from the most predominantly affiliated first run situations, such as Boston, Chicago, Los Angeles, Philadelphia, St. Paul, and Washington, D. C., in each of which the independent first run theatres played less than eleven of the defendants' features on first run during the 1943-44 season, to the most predominantly independent first run situations, such as Nashville, Louisville, Indianapolis, and St. Louis, where the affiliated first run theatres played at least 31 of the defendants' pictures on first run during that season. In none of the said 50 cities did less than three of the distributor-defendants license their product on first run to the affiliated theatres. In 19 of said 50 cities less than

three defendant-distributors licensed their product on first run to independent theatres. In a majority of said 50 cities the major share of all of the defendants' features were licensed for first run exhibition in theatres affiliated with the major defendants.

[fol. 218] 149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other "first-run" theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents.

150. Of the 92 cities in the United States having a population in excess of 100,000, Twentieth Century-Fox is interested in first run theatres in 16 and licenses its features to them. In 4 of the remaining cities, none of the defendants has theatre interests. This leaves 72 cities in which there are first run theatres operated by defendants other than Twentieth Century-Fox. In 23 of the 72 cities, Twentieth Century-Fox licenses its features to independent exhibitors.

151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor.

152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.

153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants.

154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by

[fol. 219] the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.

155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public.

156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition.

157. During the 9 pre-war years of 1933-1941, the average cost of American made Warner features rose from $241,000 in 1933 to $448,000 in 1940. By 1945 the average cost had risen to $1,371,000.

158. In the past the foreign business of Warner has been exceedingly profitable.

159. With the cessation of the war the foreign markets for Warner pictures are being severely restricted.

160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money.

[fol. 220] CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause under the provisions of the Act of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act.

2. Universal Pictures Company, Inc. and Screen Gems, Inc. have not violated the Sherman Act and should be dismissed as defendnts herein.

3. None of the defendants herein has violated the Sherman Act by monopolizing or attempting to monopolize or conspiring to monopolize the production of motion picture films.

4. The consent decree entered herein on November 20, 1940, does not foreclose enforcement in this suit at this time of any rights or remedies, which the plaintiff may have against any of the defendants by virtue of violations of the Sherman Act by them, except such acts as were in accord with such decree during the period it was in force.

5. None of the defendants herein has violated the Sherman Act by combining, conspiring or contracting to restrain trade in any part of the business of producing motion pictures or by monopolizing, attempting to monopolize, or conspiring to monopolize such business.

6. The defendants, and each of them are entitled to judgment dismissing all claims of the plaintiff based upon their acts as producers, whether as individuals or in conjunction with others.

7. The defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. [fol. 221] Pictures Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Acquiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices;

(b) Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area.

8. The distributor defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews', Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Conspiring with each other to maintain a nation-wide system of fixed minimum motion picture theatre admission prices;

[fol. 222] (b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices;

(c) Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110 above;

(e) Agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

(h) The defendants Paramount and RKO making formula deals.

9. The exhibitor-defendants, Paramount Pictures, Inc.; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Jointly operating motion picture theatres with each other and with independents through operating agreements or profit-sharing leases;

[fol. 223] (b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings;

(c) Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion pictures theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms.

10. The Formula deals, master agreements and franchises referred to in Findings 86, 88 and 89 have tended to restrain trade and violate Section 1 of the Sherman Act.

11. Block-booking as hereinabove defined, violates the Sherman Act.

12. Further conclusions of law are made and embodied in the decree filed herewith.

Dated: December 31, 1946.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
John Bright, United States District Judge.

[fol. 224] IN UNITED STATES DISTRICT COURT

MANDATE OF SUPREME COURT—Filed June 3, 1948

United States of America, ss:

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Southern District of New York.

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of New York, before you, or some of you, in a cause between The United States of America, Plaintiff, and Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, et al., Defendants, Equity No. 87-273, wherein the decree of the said District Court granting an injunction and other relief was duly entered in said cause on the 31st day of December, A. D. 1946, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated herein by reference thereto;

And whereas on January 21, 1947, the said District Court entered orders denying American Theatres Association, Inc. et al. and W. C. Allred et als, leave to intervene; [fol. 225] as by the inspection of the transcript of the record of said District Court, which was brought into the Supreme Court of the United States by virtue of appeals sued out by plaintiff and defendants and American Theatres Association, Inc., W. C. Allred et al., agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 226] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, affirmed in part and reversed in part.

It is further ordered that the orders of the District Court denying American Theatres Association, Inc. et al. and W. C. Allred et al. leave to intervene be, and they are hereby, affirmed; and that the motions of these appellants for leave to intervene in this Court be, and they are hereby, denied.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of New York for further proceedings in conformity with the opinion of this Court.

May 3, 1948.

[fols. 227-228] You, therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and forty-eight.

Charles Edwin Cropley, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 229] In United States District Court

[Title omitted]

Consent Decree as to the RKO Defendants—November 8, 1948

The plaintiff, United States of America, having filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, including Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation (hereafter sometimes referred to as the "RKO defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by

order entered February 11, 1947; the plaintiff and the RKO defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this Court; and

[fol. 230] The RKO defendants having represented to the plaintiff and to this Court that they propose to put into effect within ninety days of the date hereof a plan of reorganization which will have as its object and effect the divorcement of RKO's production-distribution assets from RKO's theatre assets; that pursuant to such plan two new holding companies will be formed, one of which (hereafter called the New Picture Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the production and distribution of motion pictures, and the other of which (hereafter called the New Theatre Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the exhibition of motion pictures; and that thereafter Radio-Keith-Orpheum Corporation will be dissolved and its stockholders will own all of the capital stock of the New Picture Company and of the New Theatre Company; and that on October 9, 1948, Howard R. Hughes was the owner of record of approximately 24% of the common stock of Radio-Keith-Orpheum Corporation and that on such date no other person or corporation was the beneficial owner of record of as much as 1% of such stock;

The RKO defendants having consented to the entry of this decree before the taking of any testimony upon the issues and matters open upon the remand of this cause, and without any findings of fact upon such issues and matters, and upon condition that neither such consent, nor this decree, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being an admission or adjudication or evidence that the allegations of the Peti-

tion or of the Amended and Supplemental Complaint, or any of them, are or is true in so far as they relate to the issues and matters so open, or that the RKO defendants, or any one or more of them, have or has violated or are or is violating any statute or law with respect to the issues and matters so open; and The United States of America by its counsel having consented to the entry of [fol. 231] this decree and to each and every provision thereof; and the Court having considered the matter,

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

The Complaint is dismissed as to all claims made against the RKO defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II

A. The defendants, Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the [fol. 232] run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting [fol. 233] of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

B. Upon the dissolution of Radio-Keith-Orpheum Corporation in accordance with the plan of reorganization outlined in the recitals of this decree, and upon the New Picture Company succeeding to the production-distribution assets, the RKO defendants shall cause the New Picture Company to file with the Court its consent to be bound by the terms of sections II, IV, V, VII and VIII of this decree,

and thereafter the New Picture Company shall be in all respects bound by the terms of such sections.

C. At any time after the entry of a final decree in this cause as to the defendants Universal Corporation and Columbia Pictures Corporation, or either of them, Radio-Keith-Orpheum Corporation and the New Picture Company, and RKO Radio Pictures, Inc., or either, or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with this decree and to comply with the provisions of such decree against said defendants Universal Corporation or Columbia Pictures Corporation or either of them, as it shall elect; and thereupon an order or supplemental decree shall be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the provisions of this section of this decree. The New Picture Company further agrees that this decree may be amended at any time after the entry of such other decree to include such new provisions against film licensing discriminations as may be included in such other decree.

[fol. 234]

III

A. The defendants Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation (herein referred to as "the RKO exhibitor-defendants"), their officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements re-referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant. The existing relationships which violate this provision shall be terminated by December 31, 1948. In dissolving such relationships one defendant may acquire the interest of another defendant if such [fol. 235] defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

6. (a) From acquiring a beneficial interest in any theatre, other than those named in paragraph 9 hereof, unless the acquiring defendant shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

(b) At any time after the entry of a final decree in this cause in which Paramount Pictures, Inc., Loew's, Incorporated, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, or National Theatres, Inc., or either of them, are bound by any provisions relating to the acquisition of beneficial interests in theatres other than acquisitions in conjunction with other exhibitors, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation and the New Theatre Company, or any of them, or their successor or successors, may file herein a written notice of election to be relieved from further compliance with subparagraph (a) of this paragraph 6 and to comply with

such provisions; and thereupon an order or supplemental decree shall be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree relating to the acquisition of beneficial interests in theatres, and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the terms of subparagraph (a) of this [fol. 236] paragraph of this decree.

7. From operating, booking, or buying features for any of it theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making or enforcing any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The theatres in which such ownerships now exist are the following:

Theatre	*Location*
Academy	New York, New York
Ace	Ozone Park, New York
Alba	Brooklyn, New York
Albany	New Brunswick, New Jersey
Alden	Jamaica, New York
Alhambra	Brooklyn, New York
Ambassador	Brooklyn, New York
Appollo	Jersey City, New Jersey
Astoria	Queens, New York
Bay	Bay City, Michigan
Bayside	Bayside, New York
Benson	Brooklyn, New York
Beverly	Brooklyn, New York
Big Rapids	Big Rapids, Michigan
Bijou	Battle Creek, Michigan
Biltmore	Brooklyn, New York
Boulevard	Jackson Heights, New York

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Theatre	*Location*
Broad	Trenton, New Jersey
Broadway	Astoria, Queens, New York
Broadway	Haverstraw, New York
Broadway	Nyack, New York
Bronxville	Bronxville, New York
Brook	Bound Brook, New Jersey
Brunswick	Trenton, New Jersey
Caldwell	St. Joseph, Michigan
Cameo	Ossining, New York
Capitol	Brooklyn, New York
Capitol	Flint, Michigan
Capitol	Jackson, Michigan
Capitol	Jersey City, New Jersey
Capitol	Kalamazoo, Michigan
Capitol	Lansing, Michigan
Capitol	Owosso, Michigan
Capitol	Portchester, New York
Capitol	Trenton, New Jersey
Carroll	Brooklyn, New York
Casino	Ozone Park, New York
Castle Hill	Bronx, New York
Center	Bay City, Michigan
Center	Cadillac, Michigan
Center	Grand Rapids, Michigan
Center	Holland, Michigan
Center	Ionia, Michigan
Center	Ludington, Michigan
Center	Owosso, Michigan
Center	Saginaw, Michigan
Center	Willow Run, Michigan
Centre	South Haven, Michigan

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Claridge	Brooklyn, New York
Clinton	Brooklyn, New York
Colonial	Brooklyn, New York
Colonial	Holland, Michigan
Colony	Brooklyn, New York

Theatre	*Location*
Commodore	Brooklyn, New York
Congress	Brooklyn, New York
Corona	Corona, New York
Cove	Glen Cove, New York
Crescent	Astoria, Queens, New York
Cross Bay	Ozone Park, New York
Crosswell	Adrian, Michigan
Crotona	Bronx, New York
Culver	Brooklyn, New York
Dawn	Hillsdale, Michigan
Della	Flint, Michigan
Desmond	Port Huron, Michigan
Duffield	Brooklyn, New York
Dumont	Dumont, New Jersey
Eagle	Pontiac, Michigan
Eastern Parkway	Brooklyn, New York
Eastown	Grand Rapids, Michigan
Elm	Brooklyn, New York
Embassy	Brooklyn, New York
Embassy	Portchester, New York
Englewood	Englewood, New Jersey
Family	Adrian, Michigan
Family	Monroe, Michigan
Family	Port Huron, Michigan
Folly	Brooklyn, New York
Forest Hills	Forest Hills, New York

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Four Star	Grand Rapids, Michigan
Franklin	Saginaw, Michigan
Fuller	Kalamazoo, Michigan
Fulton	Jersey City, New Jersey
Garden	Flint, Michigan
Garden	Ozone Park, New York
Gem	Brooklyn, New York
Gibson	Greenville, Michigan
Gladmer	Lansing, Michigan
Glen	Glen Cove, New York
Glenwood	Brooklyn, New York
Granada	Corona, New York
Grand	Astoria, Queens, New York

Theatre	*Location*
Grand	Chicago, Illinois
Grand	Grand Haven, Michigan
Hackensack	Hackensack, New Jersey
Halsey	Brooklyn, New York
Hamilton	Hamilton Township, N. J.
Hempstead	Hempstead, New York
Highway	Brooklyn, New York
Hill	Hillsdale, Michigan
Hillstreet	Los Angeles, California
Holland	Holland, Michigan
Interboro	Bronx, New York
Ionia	Ionia, Michigan
Jackson	Jackson Heights, New York
Jamaica	Jamaica, New York
Jerome	Ozone Park, New York
Keith-Albee	Huntington, West Virginia
Kent	Grand Rapids, Michigan

[fol. 240]

Kew Gardens	Kew Gardens, New York
Kinema	Brooklyn, New York
Lafayette	Suffern, New York
Lake	Benton Harbor, Michigan
Lansing	Lansing, Michigan
Lefferts	Richmond Hill, New York
Liberty	Benton Harbor, Michigan
Liberty	Elizabeth, New Jersey
Lincoln	Trenton, New Jersey
Lincoln	Kearney, New Jersey
Lynbrook	Lynbrook, New York
Lyric	Alpena, Michigan
Lyric	Cadillac, Michigan
Lyric	Ludington, Michigan
Lyric	Manistee, Michigan
Lyric	Traverse City, Michigan
Majestic	Columbus, Ohio
Majestic	Grand Rapids, Michigan
Majestic	Jackson, Michigan
Majestic	Jersey City, New Jersey
Majestic	Port Huron, Michigan
Maltz	Alpena, Michigan

Theatre	*Location*
Manhasset	Manhasset, New York
MarbleHill	Bronx, New York
Marboro	Brooklyn, New York
Marcy	Brooklyn, New York
Martha Washington	Ypsilanti, Michigan
Maspeth	Maspeth, New York
Mecca	Saginaw, Michigan
Meserole	Brooklyn, New York
Michigan	Ann Arbor, Michigan

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Michigan	Battle Creek, Michigan
Michigan	Jackson, Michigan
Michigan	Kalamazoo, Michigan
Michigan	Lansing, Michigan
Michigan	Muskegon, Michigan
Michigan	Saginaw, Michigan
Michigan	South Haven, Michigan
Michigan	Traverse, Michigan
Midway	Forest Hills, New York
Model	South Haven, Michigan
Monroe	Monroe, Michigan
Monticello	Jersey City, New Jersey
Nemo	New York, New York
Northtown	Lansing, Michigan
Oakland	Pontiac, Michigan
Oasis	Ridgewood, New York
Ogden	Bronx, New York
Orpheum	Ann Arbor, Michigan
Orpheum	Huntington, West Virginia
Orpheum	Kalamazoo, Michigan
Orpheum	Pontiac, Michigan
Our	Grand Rapids, Michigan
Palace	Bergenfield, New Jersey
Palace	Flint, Michigan
Palace	Trenton, New Jersey
Pantages	Hollywood, California
Parkhill	New York, New York
Park Plaza	Bronx, New York
Parthenon	Brooklyn, New York
Pascack	Westwood New Jersey

Theatre	*Location*
Pelham	Bronx, New York
[fol. 242]	
Pilgrim	Bronx, New York
Playhouse	Great Neck, New York
Plaza	Englewood, New Jersey
Post	Battle Creek, Michigan
Rainbow	Brooklyn, New York
Ramsdell	Manistee, Michigan
Reade	Highland Park, New Jersey
Reade's Trent	Trenton, New Jersey
Ready	Niles, Michigan
Regent	Allegan, Michigan
Regent	Battle Creek, Michigan
Regent	Bay City, Michigan
Regent	Flint, Michigan
Regent	Jackson, Michigan
Regent	Kearney, New Jersey
Regent	Muskegon, Michigan
Republic	Brooklyn, New York
Rex	East Rutherford, New Jersey
Rex	Jackson, Michigan
Rialto	Jersey City, New Jersey
Rialto	Pontiac, Michigan
Rialto	Three Rivers, Michigan
Ridgewood	Brooklyn, New York
Rivera	Brooklyn, New York
Riverside	New York, New York
Riviera	New York, New York
Riviera	Niles, Michigan
Riviera	Three Rivers, Michigan
Rivoli	Hempstead, New York
Rivoli	New Brunswick, New Jersey
Rivoli	Rutherford, New Jersey
[fol. 243]	
RKO Proctor's	Newark, New Jersey
Robinhood	Grand Haven, Michigan
Rockland	Nyack, New York
Roosevelt	Flushing, New York
Roosevelt	Woodhaven, New York
Roxy	Flint, Michigan

Theatre	*Location*
Roxy	Sturgis, Michigan
Royal	Grand Rapids, Michigan
Savoy	Brooklyn, New York
Scarsdale	Scarsdale, New York
Senate	Brooklyn, New York
Silver	Greenville, Michigan
Southtown	Lansing, Michigan
Square	Bronx, New York
Squire	Great Neck, New York
Stadium	Brooklyn, New York
State	Ann Arbor, Michigan
State	East Lansing, Michigan
State	Flint, Michigan
State	Huntington, West Virginia
State	Jersey City, New Jersey
State	Kalamazoo, Michigan
State	Muskegon, Michigan
State	New Brunswick, New Jersey
State	Pontiac, Michigan
State	Trenton, New Jersey
Steinway	Astoria, Queens, New York
Stoddard	New York, New York
Stone	Brooklyn, New York
Strand	Battle Creek, Michigan
Strand	Flint, Michigan
[fol. 244]	
Strand	Jersey City, New Jersey
Strand	Niles, Michigan
Strand	Owosso, Michigan
Strand	Pontiac, Michigan
Strand	Rockville Center, New York
Strand	Saginaw, Michigan
Strand	Sturgis, Michigan
Sunnyside	Woodside, New York
Supreme	Brooklyn, New York
Surf	Brooklyn, New York
Teaneck	Teaneck, New Jersey
Temple	Saginaw, Michigan
Times	Cincinnati, Ohio
Tipton	Huntington, West Virginia

Theatre	*Location*
Tivoli	Jersey City, New Jersey
Trabay	Traverse, Michigan
Triboro	Astoria, Queens, New York
Tuxedo	Bronx, New York
Uptown	Kalamazoo, Michigan
Utica	Brooklyn, New York
Valentine	Bronx, New York
Valley Stream	Valley Stream, New York
Victoria	Ossining, New York
Victory	Bayside West, New York
Vogue	Manistee, Michigan
Waldorf	Brooklyn, New York
Walker	Brooklyn, New York
Ward	Bronx, New York
Wealthy	Grand Rapids, Michigan
Westown	Bay City, Michigan
Westwood	Westwood, New Jersey

[fol. 245]

Whitney	Ann Arbor, Michigan
Wilson	Brooklyn, New York
Wolverine	Saginaw, Michigan
Wuerth	Ann Arbor, Michigan
Wuerth	Ypsilanti, Michigan
43rd Street	Long Island City, New York
77th Street	New York, New York

The existing joint ownership in the above enumerated theatres shall be terminated within one year from the date hereof in accordance with the following provisions:

(a) As to note to exceed thirty theatres from the above list, the RKO exhibitor-defendants or the New Theatre Company may elect to terminate such ownership either by acquiring the interest of the co-owner or co-owners therein, or by sale of the interest of RKO therein in accordance with paragraph (b) hereof. Such thirty theatres may include the Alden Theatre, Jamaica, N. Y.; the Midway Theatre, Forest Hills, N. Y.; and two of the following theatres:

Castle Hill, Marble Hill, and Pelham Theatres, Bronx, New York. Except for such four theatres, none of such thirty theatres shall be located in New York City. In the event that the existing joint interest in the RKO Proctor's Theatre at Newark, N. J., is not terminated within one year in accordance with the provisions of this paragraph, such joint interest may continue, provided that one of the joint owners shall have the sole management of the theatre and the other shall exercise no control of any kind over the theatre, except to receive fixed payments during the balance of the agreements, which shall not be determined by the net earnings of the theatre.

[fol. 246] (b) As to the remainder of the theatres above listed, including all other of such listed theatres located in New York City, the RKO exhibitor-defendants shall terminate such relation by a sale or other disposition of the interest of RKO therein, which may be either (i) to a co-owner or co-owners; or (ii) to a party not a defendant and not owned or controlled by or affiliated with a defendant in this cause.

B. In the event that the RKO exhibitor-defendants shall, pursuant to the provisions of section III-A-9-(a), acquire the interest of their co-owners in all the theatres now owned, leased, or operated by Trenton-New Brunswick Theatres Company in Trenton, New Jersey, the RKO exhibitor-defendants shall dispose of all of their interest in one first-run theatre in Trenton. The RKO exhibitor-defendants shall effect such disposition within one year from the date of their acquisition of such theatres, and shall effectuate this provision by a sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

C. Within one year of the date hereof, the RKO exhibitor-defendants shall dispose of all their interest in two of the theatres now operated by them on first-run in the central business district of Cincinnati, Ohio. The RKO exhibitor-defendants shall effectuate this provision by a

sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

D. For the purpose of any application or applications for approval of any proposed acquisition, the plaintiff and the RKO exhibitor-defendants hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application, after reasonable notice of hearing has been given to the Attorney General, may be determined [fol. 247] by any judge of the District Court for the Southern District of New York.

E. Upon the dissolution of Radio-Keith-Orpheum Corporation pursuant to the plan of reorganization outlined in the recitals of this decree, and upon the New Theater Company succeeding to the theatre assets, the RKO defendants shall cause the New Theatre Company to file with the Court its consent to be bound by sections III, IV, V, VII and VIII of this decree, and thereupon the New Theater Company shall become and thereafter be in all respects bound by the terms of such sections of this decree.

IV

Commencing one year after the entry of this decree the New Theater Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents, or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever.

V

Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of one year from the date hereof, Howard R. Hughes shall either:

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theater Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre [fol. 248] Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees.

VI

A. Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of RKO Radio Pictures, Inc., during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Radio-Keith-Orpheum Corporation has or may acquire pursuant to the terms of this decree a proprietary interest of ninety-five percent or more either directly or through subsidiaries.

[fol. 249] B. From and after the effective date of the reorganization of the RKO defendants, the provisions of

the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or RKO Radio Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this decree.

VII

A. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject-matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

[fol. 250] B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VIII

A. This decree is rendered and entered in lieu of and in substitution for the decree of this court dated December 31, 1946. This decree shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the RKO defendants shall not have been approved by the stockholders of Radio-Keith-Orpheum Corporation within 90 days from the entry of this decree.

B. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: November 8, 1948.

Augustus N. Hand, United States District Judge,
Henry W. Goddard, United States District Judge,
Alfred E. Coxe, United States District Judge.

[fol. 251] We hereby consent to the entry of the foregoing decree:

For the Plaintiff: Herbert A. Bergson, Robert L. Wright, Sigmund Timberg, George H. Davis, Jr.

For the Defendants: Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation.

By William J. Donovan, Ralstone R. Irvine, Gordon E. Youngman, Their Attorneys.

I hereby consent to the entry of section V of the above decree:

Howard R. Hughes, By Ralstone R. Irvine, His Attorney.

[fols. 252-253] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—Filed January 20, 1949

On petition of defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation, and on consent of the United States of America to the entry hereof, it is hereby

Ordered, adjudged, and decreed that Section VIII A of the consent decree entered herein as to said defendants on November 8, 1948, be and the same hereby is modified to read as follows:

"This decree is rendered and entered in lieu of and in substitution for the decree of this court dated December 31, 1946. This decree shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the RKO defendants shall not have been approved by the stockholders of Radio-Keith-Orpheum Corporation on or before March 30, 1949."

Dated: New York, N. Y., Jan. 20, 1949.

Augustus N. Hand, U. S. C. J., Alfred E. Coxe, Henry W. Goddard.

[File endorsement omitted.]

[fol. 254] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON MOTION TO AMEND DECREE—Filed October 10, 1949

The Court having considered the motion of the defendant, Radio-Keith-Orpheum Corporation, for modification of Sections IV, V, and VI of the Consent Decree as to the RKO defendants, dated November 8, 1948, as modified, in

the respect therein set forth, and the consent thereto of Howard R. Hughes and of the plaintiff herein; and

The Court having considered the stipulation of the plaintiff and Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. for the modification of Section II-A of such Decree; and

It appearing that such modification should be ordered:

It is hereby ordered, adjudged and decreed as follows: The Consent Decree as to the RKO defendants, dated November 8, 1948, as modified, is hereby amended as follows:

(1) By deleting from Section IV of said Decree the words "Commencing one year after the entry of this Decree" and by substituting therefor "Commencing eighteen months after the entry of this Decree";

(2) By deleting from the first paragraph of Section of said Decree the words "Within a period of one year from the date hereof" and by substituting therefor "Within a period of eighteen months from the date hereof";

(3) By deleting from Section VI A of said Decree the words "during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment," and by deleting from Section VI B the words "From and after the effective date of the reorganization of the RKO defendants," and by substituting therefor "From and after November 8, 1949."

[fols. 255-256] (4) By adding in Section II A a new paragraph as follows:

"8. The RKO Defendants are prohibited from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others. This paragraph shall be subject to and without prejudice to the rights of the plaintiff and of Radio-Keith-Orpheum Corporation, RKO Radio Pictures,

Inc., and the New Picture Company, or either, or the successor or successors of either, to have this Decree modified to substitute for this paragraph such provision against film licensing discrimination as may be included in any final decree in this cause against Universal Corporation and Columbia Pictures Corporation, or either of them; and without prejudice to the rights under the provisions of Section II, Paragraph C hereof."

Augustus N. Hand, United States District Judge,
Henry W. Goddard, United States District Judge,
Alfred E. Coxe, United States District Judge.

Dated: October 10, 1949.

[File endorsement omitted.]

[fol. 257] In United States District Court

[Title omitted]

Order on Motion to Amend Decree—Filed November 18, 1949

The Court having considered the motion of the defendant Radio-Keith-Orpheum Corporation, for modification of Section III of the Consent Decree as to the RKO defendants, dated November 8, 1948, as modified, in the respects therein set forth; and

It appearing that such modification should be ordered:

It is hereby ordered, adjudged and decreed as follows:

The Consent Decree as to the RKO defendants, dated November 8, 1948, as modified, is hereby amended as follows:

(1) By deleting from Section III A 9 of such Decree, in the sentence immediately following the list of theatres, the words "within one year from the date hereof."

(2) By deleting from Section III A 9, subparagraph (a) in the sentence referring to the RKO Proctor's Theatre at Newark, New Jersey, the words "within one year."

[fol. 258] (3) By adding to Section III A 9 a new subparagraph to read as follows:

"(c) Subject to the provisions of subparagraphs (a) and (b), on or before February 16, 1950, the RKO exhibitor-defendants shall terminate such of the existing joint ownerships in each of the above enumerated theatres as have not been terminated by November 18, 1949. Provided, however, that as to each corporation in which such joint ownerships exist, and with respect to which such defendants shall have been unable to terminate the existing joint ownership, the RKO exhibitor-defendants shall on or before February 16, 1950 elect one or more of the following courses of action:

(i) to institute and prosecute with due diligence judicial proceedings, including but not limited to proceedings in the courts of any state for the dissolution of such corporation, which proceedings, if successful, will result in the termination of the joint ownership in such corporation or theatre; or

(ii) to present to the Court some definitive plan or plans for compliance with this section of this Decree. This election shall be evidenced by the filing of such plan or plans with the Clerk of this Court. Notice of such plan or plans shall be served upon the plaintiff prior to filing in Court, in order to afford the plaintiff a reasonable opportunity to be heard thereon. Upon approval of such plan or [fol. 259] plans by the Court, as submitted, or with such modifications as may be directed or may be approved by the Court, such plan or plans shall be carried into effect within a period of time set by the Court in its order of approval or modification; or

(iii) to trustee the stock owned by RKO in the corporation in which such joint interest exists. This election shall be evidenced, as to each corporation in which the existing ownership has not been terminated by February 16, 1950, by the failure of the RKO exhibitor-defendants to proceed as to such corporation under subparagraph (i) or (ii) hereof; or

by a final order, without leave to amend, disapproving a plan submitted with respect to such corporation under subparagraph (ii) hereof; or by the application by such defendants for the designation of such trustee or trustees. The trustee or trustees shall be appointed by the Court and shall have such reasonable powers, duties, and authority as shall be determined and set by the Court in the order of appointment or any modifications thereof. As to each corporation or theatre with respect to which the RKO exhibitor-defendants elect this alternative, the interest so trusteed shall be held and dealt with by the trustee upon terms approved by the Court after the parties have had an opportunity to be heard, upon a finding that they are reasonable and [fols. 260-261] fair to the RKO exhibitor-defendants, to all others interested in such corporation or theatre, and to the public.

(iv) Nothing in this subparagraph shall waive the right of any party to appeal from any final order of this Court."

(4) By deleting from Section III-C the words "Within one year of the date hereof," and substituting the words "On or before February 16, 1950."

Dated: November 18, 1949.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
Alfred E. Coxe, United States District Judge.

[File endorsement omitted.]

[fol. 262] In United States District Court

[Title omitted]

Order Amending Judgment—Filed April 12, 1950

Upon the judgment entered against the RKO defendants on November 8, 1948 and the amendments thereto; upon the judgment entered by this Court on February 8, 1950

against Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc., Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc., and United Artists Corporation; and upon the statement annexed hereto and made part hereof,

It is ordered that paragraph 5 of section II A of the RKO judgment of November 8, 1948 be and hereby is amended so that it shall read as follows:

> From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant or with theatres in new circuits which may be formed as a result of divorcement. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

The RKO defendants do not object to the entry of the aforesaid order:

Ralstone R. Irvine.

Dated: March 28, 1950.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
Alfred E. Coxe, United States District Judge.

[File endorsement omitted.]

[fol. 263] AFFIDAVIT

CITY OF WASHINGTON,

District of Columbia, ss:

Philip Marcus, being duly sworn, deposes and says that he is an attorney connected with the Antitrust Division

of the Department of Justice and is familiar with the proceedings had in the case known as United States v. Paramount Pictures, et al. On November 8, 1948, a judgment was entered against the defendants known as the RKO defendants. Section II A of that judgment contains injunctive provisions relating to trade practices and paragraph 5 of said section reads as follows:

> From further performing any existing franchise to which it is a party and from making any franchise in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

Paragraph C of said judgment provides that:

> At any time after the entry of a final decree in this cause as to the defendants Universal Corporation and Columbia Pictures Corporation, or either of them, Radio-Keith-Orpheum Corporation and the New Picture Company, and RKO Radio Pictures, Inc., or either, or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with this decree and to comply with the provisions of such decree against said defendants Universal Corporation or Columbia Pictures Corporation or either of them, as it shall elect; and thereupon an order or supplemental decree shall [fols. 264-265] be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the provisions of this section of this decree. The New Picture Company further agrees that this decree may be amended at any time after the entry of such other decree to include such new provisions

against film licensing discriminations as may be included in such other decree.

On February 8, 1950 this Court entered a judgment against Universal Corporation and Columbia Pictures Corporation which prohibited in Paragraph 5 thereof the use of franchises to prefer affiliated theatre circuits or circuits resulting from divorcement. The exact language of that paragraph is as follows:

> From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant (or with theatres in new circuits which may be formed as a result of divorcement). The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

This provision is similar to that now contained in judgments against all the defendants except the RKO defendants.

The attached order is presented to the Court pursuant to paragraph C of the RKO judgment quoted above. The only amendment made by this order is to add the words "or with theatres in new circuits which may be formed as a result of divorcement".

The effect of this order is to include in the RKO judgment a provision against film licensing discrimination similar to that now contained in the judgments against the other defendants.

Philip Marcus, Special Assistant to the Attorney General.

Sworn and subscribed to before me this 24th day of March, 1950. Harry J. Pizza, Notary Public, D. C. My commission expires May 14, 1954.

[fol 266] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

ORDER ON MOTION FOR MODIFICATION OF CONSENT DECREE AND OF MOTION FOR APPOINTMENT OF A TRUSTEE—Filed April 24, 1950

The Court having considered the motion of the defendant Radio-Keith-Orpheum Corporation for modification of Sections IV, V, VI A and VI B of the Consent Decree as to the RKO defendants dated November 8, 1948 as modified; and having considered the motion of the plaintiff for the appointment of a trustee to effectuate the reorganization of Radio-Keith-Orpheum Corporation pursuant to the Consent Decree as to the RKO defendants as modified:

It is hereby ordered, adjudged and decreed as follows:

The motion of the plaintiff for the appointment of a trustee to carry out certain provisions of Section III-A 9 of the Consent Decree as to the RKO defendants is hereby denied.

The motion of the defendant Radio-Keith-Orpheum Corporation is granted in part, and the Consent Decree as to the RKO defendants dated November 8, 1948 as modified [fols. 267-268] is hereby amended by deleting from the first paragraph of Section IV of said Decree, as amended, the words "Commencing eighteen months after the entry of this Decree" and by substituting therefor "On and after January 1, 1951."

Dated: New York, N. Y., April 24, 1950.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
Alfred E. Coxe, United States District Judge.

Approved as to form: Harold Lasser, for the Plaintiff.
Donovan Leisure Newton Lumbard & Irvine, by Roy W. McDonald, Attorneys for Radio-Keith-Orpheum Corporation and the RKO Defendants.

[fol. 269] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—January 18, 1950

This Court, having on November 8, 1948, directed the entry of a Consent Judgment as to the defendants, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation (hereinafter referred to as the "RKO defendants"), and it having been provided in Section VIII, Subsection A, of said Consent Judgment as amended by order of this Court dated January 20, 1949, that:

> "This decree shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the RKO defendants shall not have been approved by the stockholders of Radio-Keith-Orpheum Corporation on or before March 30, 1949."

Now, on reading and filing the affidavit of J. Miller Walker, sworn to on October 4, 1949, from which it appears that said proposed reorganization was approved by the [fol. 270] stockholders of Radio-Keith-Orpheum Corporation prior to March 30, 1949, it is

Ordered, adjudged and decreed that the above entitled action be and the same hereby is severed and terminated as against the RKO defendants, as of the 8th day of November, 1948.

Dated: New York, N. Y., January 18, 1950.

Augustus N. Hand, U. S. C. J., Henry W. Goddard, U. S. D. J.; Alfred E. Coxe, U. S. D. J.

[fol. 271] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION—Filed December 28, 1950

It is hereby stipulated and agreed between the plaintiff and Howard R. Hughes that pursuant to Section V of the consent judgment entered in this cause on November 8, 1948, as amended;

1. The name of Irving Trust Company, located at 1 Wall Street, New York, New York, is hereby suggested to this Court as trustee to take over and to hold stock held by Howard R. Hughes in the New Theater Company.

2. It is also agreed that if said Irving Trust Company is not satisfactory to this Court as trustee herein, the parties shall, within two weeks after being so advised by the Court, suggest to the Court three other names for consideration as trustee.

3. The trustee shall have power to vote the stock in such manner as in the opinion of the trustee shall be in the best interests of the corporation and not inconsistent with the provisions of this judgment.

4. The stock shall be issued to and shall stand in the name of the trustee as such upon the books of the New Theatre Company, but Howard R. Hughes shall remain the equitable owner.

5. The compensation of the trustee is to be commensurate with services performed and is to be fixed by the Court upon termination of the trust or at such other times as the Court may deem proper upon motion of the trustee.

[fol. 272] 6. During the existence of the trusteeship, the trustee shall not have any financial interest in the New Picture Company or the New Theatre Company by way of loans, stock or bond interests, or by way of being represented in the New Picture Corporation through the board of directors or officers. If the trustee is empowered to sell said stock, then at such time as it shall have such power, the trustee shall have no representative on the Board of Directors or as officer of the New Theater Company. It is also agreed that the trustee, during the period of the trusteeship, shall not be connected with Howard R. Hughes

by way of loans or participation in enterprises in which Howard R. Hughes is a substantial or controlling stockholder.

7. It is understood by the parties that the plaintiff will move this Court by formal motion returnable during the month of January for an order providing that the terms of this trusteeship shall include a provision empowering and requiring the trustee, if Howard R. Hughes shall not have disposed of it, to sell the stock entrusted to him under terms and conditions to be established by this Court, at any time after one year from the date of entry of an order upon the Government's motion. Howard R. Hughes will contest such motion.

/s/ T. A. Slack, Attorney for Howard R. Hughes,
/s/ Philip Marcus, Attorney for the Plaintiff.

So ordered as to Paragraphs 3, 4, 5, 6 and 7. The Irving Trust Company is hereby appointed trustee, as suggested in Par. 1 of the above stipulation.

/s/ Augustus N. Hand, United States Circuit Judge, /s/ Henry W. Goddard, United States District Judge, /s/ Alfred C. Coxe, United States District Judge.

[File endorsement omitted.]

[fol. 273] In United States District Court

[Title omitted]

Motion

Please take notice that upon the affidavit of Philip Marcus, annexed to and made part hereof, and upon all the pleadings and proceedings had herein, the plaintiff will move this Court on the 15th day of February, 1951 at 4 P. M., or as soon thereafter as counsel may be heard, at the Federal Court House, Foley Square, New York City, for the entry of the order attached hereto, amending the order of December 28, 1950, by requiring the trustee of the stock held by Howard R. Hughes in the New Theatre Company to dispose of such stock.

/s/ Philip Marcus, Attorney for Plaintiff.

[fol. 274] PROPOSED ORDER

The Court having considered the motion of the plaintiff, and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that, if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20, 1953 the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered on November 8, 1948 and the other judgments entered in this cause. Disposition may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and, so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed dispositions of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

——— ———, United States Circuit Judge, ——— ———, United States District Judge. ——— ———, United States District Judge.

[fol. 275] AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss.

Philip Marcus, being duly sworn, deposes and says that he is attorney for the plaintiff in the above entitled cause and is familiar with the facts herein recited.

A consent judgment signed personally by Howard R. Hughes was entered by this Court against RKO and Howard R. Hughes on November 8, 1948. Under the terms of Section V of that order, Howard R. Hughes was required within a period of one year from the date of the entry of the judgment to dispose of his holdings of the stock in either the New Picture or the New Theatre Company or

deposit with a trustee designated by the Court the shares of stock in one of the companies. Section V also provided that the trust agreement should remain in force until Howard R. Hughes had sold his stock and that the trust should be upon such other terms and conditions as should be prescribed by the Court. This Section also states that during the period of the trust Howard R. Hughes should be entitled to receive the proceeds of the sale of the stock as well as dividends and other distribution made on account of the trusteed shares.

More than two years have elapsed since the entry of the judgment of November 8, 1948, without a sale of the stock or any part of it being made by Howard R. Hughes. [fol. 276] Only very recently was the stock trusteed. Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment. At that time he gave a commitment not to ask a further extension. That commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950. During the course of the argument, however, Howard R. Hughes, by his attorney, withdrew his motion and subsequently filed with this Court a letter of May 5, 1950, in which he stated he would trustee his theater stock.

At the end of last year, RKO separated into a New Picture Company and a New Theatre Company.

It is affiant's considered opinion that there can be no real separation of the RKO Picture Company from the RKO Theatre Company and no complete termination of control of both those companies by Howard R. Hughes, while the latter may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company. Howard R. Hughes has already filed a statement with this Court that he intends to remain with the Picture Company. Yet if he can merely trustee his stock in the Theatre Company, he can continue under the terms of Section V of the consent judgment to draw dividends from the Theatre Company, and thus he and the Picture Company will continue to have a very real interest in the financial success of the Theatre Company.

The proposed order would give Howard R. Hughes another year within which to endeavor to dispose of the stock,

at which time three years from the date of entry of the judgment would have elapsed, during all of which period Howard R. Hughes would have been entitled to draw dividends from the Theatre Company as well as from the [fol. 277] Picture Company. The proposed order provides that after such time the trustee shall, as expeditiously as possible, take all necessary steps to dispose of the stock, having in mind that dispositions should not be made which would unreasonably restrain competition. The proposed order also provides that to the extent possible dispositions should be made which would not cause a sacrifice to Howard R. Hughes, but at any rate disposition of the stock should be made within a period of two years from December 29, 1951.

/s/ Philip Marcus, Special Assistant to the Attorney General.

Sworn and subscribed to before me this 11th day of January 1951. /s/ Harry J. Pizza. My commission expires.

[fol. 278] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO MOTION OF UNITED STATES OF AMERICA TO AMEND CONSENT DECREE TO REQUIRE SALE OF NEW THEATRE COMPANY STOCK

Howard R. Hughes, without consenting to the trial or determination by this Court in this proceeding of any matters beyond the scope of the expressed terms of the Consent Decree, appears herein specially and moves the Court to dismiss or, in the alternative, to deny the motion of the United States of America referred to in the caption upon the following grounds which will appear as a matter of record in the cause or from the affidavit attached hereto:

1. The Court is without jurisdiction in proceeding of this kind to alter or enlarge upon the terms of the Consent Decree respecting the liabilities or obligations of Howard R. Hughes, who is a party hereto only to the extent of his voluntary consent.

2. The Consent Decree was no more than a contractual settlement of the pending case to which the Court gave its [fol. 279] sanction and to which, *as it was written*, Howard R. Hughes entered his consent. No forced sale of the stock was contemplated by the Consent Decree and the Court has no jurisdiction in a proceeding of this kind to enter any order or to require the performance of any act not reasonably necessary to carry out the *expressed terms of the Consent Decree.*

3. In any event the motion of the United States of America is premature because:

(a) The New Theatre Company stock has not been in existence except since January 1, 1951.

(b) There is no showing that Howard R. Hughes is not making a bona fide effort to dispose of one or the other of the stocks which he received in exchange for his old Radio-Keith-Orpheum Corporation stock.

(c) This proceeding could be as well brought for all purposes at a later date as at the present time.

(d) A present order such as is sought by the United States of America would be an unfair detriment to a free market for Howard R. Hughes.

4. The order requested by the United States of America would be in violation of the expressed terms of the Consent Decree because it would require sale of the New Theatre Company stock by the trustee even though Howard R. Hughes should prior to that time have disposed of the New Picture Company stock.

/s/ T. A. Slack, Attorney for Howard R. Hughes.

[fol. 280] AFFIDAVIT

STATE OF CALIFORNIA,
County of Los Angeles, ss:

T. A. Slack being first duly sworn upon oath deposes and says:

1. That he is an attorney at law, a member of the Bar of the State of Texas, and has the permission of this Court to appear herein as the attorney for Howard R. Hughes.

2. Prior to the entry of the Consent Decree of November 8, 1948 in the above cause deponent represented Radio-Keith-Orpheum Corporation in its negotiations with the Department of Justice of the United States and with the Commissioner of Internal Revenue of the United States pertaining to a settlement of the above cause insofar as it affected Radio-Keith-Orpheum Corporation. After extensive negotiations, the terms of the Consent Decree were mutually agreed upon by the Department of Justice and Radio-Keith-Orpheum Corporation, subject to the approval of this Court. The other terms of the agreement between the parties, however, at the insistence of the Department of Justice were made subject to incorporating in the Consent Decree Paragraph V thereof (affecting certain stock owned by Howard R. Hughes) and to the consent of [fol. 281] Hughes to the *to the* entry of the decree.

3. In order to facilitate the settlement of the cause as between the two parties mentioned, Howard R. Hughes did agree to entry of the decree as it was and is written, but at no time did he make any other agreements respecting his stock interest in the defendant corporation and particularly did he not agree that he might be required to sell any of such stock at any time.

4. To the best of affiant's knowledge and belief, at the time the Consent Decree was entered there had been no agreement of settlement reached between the United States and any other defendant in the cause and no other defendant had agreed to a divorcement between its producing and exhibiting properties. At that time there had been no order of any Court which determined, or gave any substantial indication, that the United States might be suc-

cessful in its efforts to cause a divorcement between the two types of properties.

5. It was against this background which existed at the time that the duly authorized representatives of the United States freely expressed in the presence of this affiant that the Consent Decree affecting the divorcement set forth therein with respect to RKO would be of substantial advantage and weight in favor of the Government's contentions for divorcement in the cases of the other defendants.

6. At no time at or prior to the entry of the Consent Decree was it ever suggested that Howard R. Hughes would be considered to have any obligation with respect to any of his stock other than those therein set forth. It is not believed to have been in the minds of any of the parties [fol. 282] to the negotiations and certainly was not in the mind of this affiant or Howard R. Hughes that the provision in the Consent Decree relating to the voting trust, viz., "Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court" was anything more than an expression of the necessarily implied powers of the Court to implement the expressed purpose of the trust by any necessary details such as compensation of the trustee, qualifications, etc. No basic right or obligation was contemplated which was not set forth in the decree.

7. The Honorable Attorney General is mistaken in his affidavit that "Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment". The record speaks for itself on the fact that Howard R. Hughes has at no time appeared in this cause or before this Court for any purpose other than to enter his formal consent to the agreed judgment or to agreements or motions filed herein by RKO. Such formal consent by Howard R. Hughes has been necessary in each case because he would not receive his stock in the new companies until after reorganization and any postponement of reorganization necessarily had to postpone the date upon which the new stock which would be issued to him would have to be deposited in the voting trust.

8. When RKO asked for an extension in September of 1949 the Attorney General requested and received from

Howard R. Hughes a letter dated September 30, 1949 which was as follows:

[fol. 283] "The Attorney General
Department of Justice
Washington, D. C.

UNITED STATES OF AMERICA v. PARAMOUNT PICTURES, INC., ET AL.

Dear Sir:

On behalf of Mr. Howard R. Hughes I am authorized to state to the Department of Justice as follows:

1. In the event that the application of RKO for amendments of the RKO Consent Decree is approved by the Court, to which amendments Mr. Hughes consented, he will not pe-ition for further extension of the time provided for, in Section V of such Decree, within which he must comply with such Section.

2. In making this statement, it is our understanding that if prior to May 8, 1950 Mr. Hughes has not received the stock of the New Theatre Company and the New Picture Company issuable under the Plan of Reorganization, he will comply with the requirements of Section V B of such Decree if he shall file with the Court by such date a statement that he has elected to deposit with the trustee designated by the Court, in accordance with Section V B, his shares of the New Picture Company or the New Theatre Company, as he may elect, when issued to him pursuant to the plan, subject to his right to sell prior to such deposit in accordance with Section V A of such Decree.

Very truly yours, /s/ Ralstone R. Irvine, Attorney for Howard R. Hughes."

The Honorable Attorney General is again mistaken in his affidavit that "The commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950". The record will show that upon the date in question the defendant *Radio-Keith-Orpheum Corporation* again petitioned this Court for an extension of the time within which it was required to accomplish the separation of its two activities

and that again this motion was based entirely upon what was in the supposed best interests of the corporation. Howard R. Hughes was not a party to such motion except to indicate his consent.

[fol. 284] 9. Since entry of the Consent Decree there have been several negotiations from the purchase of the New Theatre Company stock owned by Howard R. Hughes upon a "when issued" basis. Because New Theatre Company could not come into existence until reorganization and because of the closely integrated capital structure which existed prior to reorganization, extremely difficult problems arose in connection with any contemplated sale by Hughes. From a practical standpoint, nothing could be transferred to any purchaser in the way of stockholders' rights normally incident to the stock. The actual properties of the theatre corporation necessarily had to remain under the operation and control of its parent until reorganization. It was only on January 1, 1951, that the New Theatre Company stock, which has been trusteed by Hughes, was actually issued to him so that a completed sale thereof could actually be accomplished.

10. For many months past, and during negotiations looking toward the possible sale upon a future basis of the New Theatre Company stock by Hughes, there have been persistent statements and misunderstandings to the effect that Howard R. Hughes would be "forced" to sell his stock in one or the other of the companies by various dates which more often than not were named as December 31, 1950. It seemed that no denials or explanations were sufficient to put down this false concept which was the subject of so often repeated assertions.

11. In the opinion of affiant, either the fact or false conclusions that Hughes would be under a compulsion to sell a block of stock of this size and type would necessarily affect adversely the market for it.

[fol. 285] 12. It is the opinion of affiant that an order of this Court such as that urged by the United States would uselessly tend to depress the possible market for the New Theatre Company stock and would only tend to defeat its own purposes. It is impossible to enter an order which would establish a time limit within which sale of stock

would be forced without destroying the right to a free market which Howard R. Hughes possesses under the terms of the Consent Decree.

/s/ T. A. Slack.

Subscribed and sworn to before me this 9th day of February, 1951.

/s/ John S. Hodge, Notary Public in and for the State of California, County of Los Angeles. (Seal).

[fol. 286] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

REQUEST TO FILE SUPPLEMENTAL AFFIDAVIT

T. A. Slack, attorney for Howard R. Hughes in the above cause, requests leave of the Court to file herein, before rendition of the final judgment, the supplemental affidavit attached hereto in order that there may be no misunderstanding of the position and contention of Howard R. Hughes.

/s/ T. A. Slack, Attorney for Howard R. Hughes.

[fol. 287] AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

T. A. Slack, attorney for Howard R. Hughes, being duly sworn on oath deposes and says:

The Government's affidavit and motion is to obtain modification of the terms of the trust in a manner not contemplated by the Consent Decree. It fails, however, to allege or set forth any change in the present conditions from those which existed at the time of the entry of the Consent Decree. Nor does it set forth any facts which were not clearly foreseeable at such time.

The affidavit of Government's counsel sets forth only two facts which are (1.) Hughes has not sold the stock in New

Theatre Company and (2) Hughes will receive any dividends from such stock.

The first fact was expressly contemplated in the Consent Decree and the consequences were prescribed. That the [fol. 288] second fact would be true was recognized and prescribed for in the Consent Decree.

Thus, the Government's support of its motion is nothing but the "considered opinion" of its present counsel that there can be no "real separation" of RKO Pictures Company from RKO Theatres Company and no "complete termination of control of both these companies" by Mr. Hughes while he "may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company". The considered opinion of counsel who represented the Government when this Consent Decree was signed was to the contrary. Then, the Government considered that its interests would be fully protected without a requirement that Mr. Hughes dispose of his stock interest in either company. Consequently, the Consent Decree gave Mr. Hughes an option either to dispose of his holding of the stock of one or the other of the companies or to deposit the shares of one with a trustee under a "voting trust".

Howard R. Hughes has expressly declined to consent to any determination of his rights in this proceeding. An order may not be made effectively modifying the terms of the Consent Decree because there has been no satisfactory showing by competent evidence in a proceeding for that purpose that there have been such changes in the conditions which require such modification.

The Consent Decree sanctioned an agreement between the United States of America and the other parties thereto in which substantial benefits were derived by all parties and the Government may not now seek to withdraw from [fol. 289] its agreement; in any event without a relitigation of the entire matter.

/s/ T. A. Slack.

Subscribed and sworn to before me this 21st day of February, 1951.

/s/ Dorothea A. O'Brien, Notary Public, State of New York.

[fol. 290] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—March 24, 1951

The Court having considered the motion of the plaintiff and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20th, 1953, the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered in this cause. Disposition may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed disposition of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

Dated: March 24, 1951.

/s/ Augustus N. Hand, U. S. Circuit Judge, /s/ Henry W. Goddard, U. S. District Judge, /s/ Alfred H. Coxe, U. S. District Judge.

[fol. 291] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ALLOWANCE THEREOF—Filed April 19, 1951

Considering himself aggrieved by the final decree and judgment of this Court entered on March 24, 1951 (amending its order of December 28, 1950 appointing a trustee to hold the capital stock of the New Theatre Company owned by Howard R. Hughes), Howard R. Hughes, appellant

herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from such and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said appellant, and that the amount of security be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and [fol. 292] provided.

Respectfully submitted, (s) T. A. Slack, Counsel for Appellant, (s) Leonard P. Moore, Atty. for Appellant.

Appeal allowed, upon the filing of a *$250.00* bond.

(s) Augustus N. Hand, (s) Henry W. Goddard, (s) Alfred C. Coxe, Members of Three Judge District Court acting in above cause.

Dated: April 15th, 1951.

[File endorsement omitted.]

[fol. 293] In the United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed April 19, 1951

Howard R. Hughes in connection with his appeal to the Supreme Court of the United States hereby files the following assignment of errors upon which he will rely in his prosecution of said appeal from the final judgment or decree of the District Court entered on March 24, 1951.

The District Court erred:

1. In ordering the trustee (appointed on December 28, 1950 as a voting trustee of the stock in the New Theatre

Company owned by Howard R. Hughes) to dispose of the stock unless it shall have been disposed of by Howard R. Hughes prior to a fixed date.

2. In that the final order or decree complained of would deprive Howard R. Hughes of his property (the New Theatre Company stock) without due process of law, there being no foundation for such order of sale either in the consent decree of November 8, 1948 or in any facts properly before the Court or in any finding or adjudication theretofore made in the cause.

[fol. 294] 3. In that the final judgment of March 24, 1951 modified the consent decree of November 8, 1948 to the serious detriment of Howard R. Hughes without his consent and without proper showing of any change in the conditions, facts, and circumstances which existed at the date of the consent decree.

4. In that its final order or decree of November 8, 1948, in fact amounted to confiscation of the property of Howard R. Hughes (the New Theatre Company stock) without his consent and without justification therefor in law.

5. In holding that the Court, upon motion of the Government and without proper showing of any facts to support it, had the power to accomplish the confiscation of the property of Howard R. Hughes, contrary to the expressed terms of such consent decree.

6. In that its order to the trustee to sell the stock of Howard R. Hughes was an abuse of any power to modify the consent decree, being founded neither upon agreement of the parties nor upon any evidence or findings of fact in the cause.

Wherefore, Howard R. Hughes prays that the final decree of the District Court be reversed and have such other relief as the Court may deem fit and proper.

[File endorsement omitted.]

(s) T. A. Slack, Counsel for Appellant, (s) Leonard P. Moore, Atty. for Appellant.

T. A. Slack, 7000 Romaine Street, Hollywood 38, California.
Leonard P. Moore, 25 Broadway, New York 4, N. Y.

[fol. 295] Citation in usual form showing service, omitted in printing.

[fols. 296-297] Omitted. Printed side page, 293 ante.

[fols. 298-299] Statement Required by Paragraph 2 Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing.)

[fols. 300-303a] Proof of Service of Documents Under Paragraph 2 of Rule 12 and Paragraphs 1 and 2 of Rule 10 of United States Supreme Court Rules (omitted in printing.)

[fol. 303b] In United States District Court

[Title omitted]

Motion for Modification of the Consent Decree as to the RKO Defendants, Dated November 8, 1948, as Amended April 12, 1950

The defendant, Radio-Keith-Orpheum Corporation moves this Court,

Upon the Consent Decree entered herein as to the RKO defendants, on November 8, 1948, and as amended on October 10, 1949, to enter an order pursuant to Section VIIIB thereof, modifying said Consent Decree as follows:

(1) By deleting from the first paragraph of Section IV of said Decree, as amended, the words "Commencing eighteen months after the entry of this Decree" and by substituting therefor "On or before February 8, 1953";

(2) By deleting from the first paragraph of Section V of said Decree, as amended, the words "Within a period of eighteen months from the date hereof" and by substituting therefor "On or before February 8, 1953";

(3) By adding to Section VIA of said Decree, as amended, [fol. 304] after the words "RKO Radio Pictures, Inc." the words, ",during the period required for the completion of

the reorganization of the RKO defendants, which shall in any event occur by February 8, 1953,";

(4) By deleting from Section VIB of said Decree, as amended, the words "From and after November 8, 1949," and by substituting therefor "From and after the effective date of the reorganization of the RKO defendants,"; and

To fix April 19, 1950 as the date for a hearing on said motion.

Dated New York, N. Y., April 12, 1950.

Respectfully submitted, Donovan, Leisure, Newton, Lumbard & Irvine, Attorneys for defendant Radio-Keith-Orpheum Corporation, Office and P. O. Address, Two Wall Street, New York 5, N. Y.

Entry of an order relating to Section V of said Decree pursuant to the above motion is hereby consented to.

Howard R. Hughes

By (S) Ralstone R. Irvine, his attorney.

[fol. 305] In United States District Court

[Title omitted]

Affidavit—Filed April 18, 1950

United States of America,
State of New York,
County of New York, ss.:

Ned E. Depinet, being duly sworn, deposes and says:

I am President and a Director of Radio-Keith-Orpheum Corporation and of its wholly owned subsidiary RKO Radio Pictures, Inc.

I make this affidavit in support of the application of RKO for a modification of the Consent Decree entered herein as to the RKO defendants* on November 8, 1948, and as

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* The term "RKO defendants" refers to the original defendants, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation.

amended, on October 10, 1949 to extend the time specified in Articles IV and V from May 8, 1950 to February 8, 1953, and to permit RKO Radio Pictures, Inc. (hereinafter called the "Picture Company"), during the period required for the completion of the reorganization of the RKO defendants, but in no event later than February 8, 1953, to license motion pictures which it may distribute, without restriction, to theatres in which RKO has or may acquire a proprietary interest of ninety-five per cent or more, either directly or through subsidiaries.

[fol. 306] On November 8, 1948, and before the taking of further evidence before this Court, pursuant to the Supreme Court's order of remand herein, the RKO defendants entered into a Consent Decree which provided that they would put into effect a plan of reorganization for the divorcement of RKO's production-distribution assets from its theatre assets by the creation of a New Picture Company and a New Theatre Company, the dissolution of Radio-Keith-Orpheum Corporation and distribution of the stock of the New Picture and Theatre Companies to its stockholders so that commencing one year after entry of said Decree said new companies would be operated wholly independently of each other and without common officers, directors or employees.

At that time the RKO directors belived in good faith that such a reorganization could be effected by November 8, 1949, and accordingly, within the ensuing five months they caused to be submitted to its stockholders a plan of such reorganization. The stockholders approved this plan.

The Reorganization Plan contemplates that the New Picture Company and the New Theatre Company will commence their respective independent operations in sound financial condition and equipped to meet any normal competitive and business conditions. In working out the plan the Directors had to deal with the fact that the Picture Company was traditionally under-capitalized and was dependent upon loans from the parent company and upon outside banking arrangements to provide it with working capital. Over the years the unpaid amount of such loans from the parent company aggregate $35,000,000. Accordingly, the plan of reorganization provides for the creation

of $10,000,000 of additional initial working capital for the New Picture Company by the transfer to it of cash in that amount from the parent company, and contemplates that, if required in the operation of its business, the Picture Com-
[fol. 307] pany would be provided with an adequate line of banking credit. At the time when the plan was formulated, the financial condition of the Picture Company justified the directors in believing that if the existing favorable line of credit could not be extended it could be paid off, and a substitute line of credit effected, or its financial requirements handled in some other manner which would not jeopardize the competitive position of the Picture Company. Since that time, however, the financial position has altered so radically as to make it essential that the existing credit arrangement be extended since new credit upon equally favorable terms cannot be obtained today.

By the summer of 1949 the continuance of the recession in motion picture theatre receipts and other financial obstacles which were not foreseen in the fall of 1948 convinced the directors that the plan was not then feasible and that an attempt to consummate the reorganization by November would seriously endanger the ability of the proposed New Picture Company to operate successfully as an independent company. The directors accordingly brought these developments to the attention of the Department of Justice, seeking its consent to a postponement of the time to effect dissolution until July 15, 1950. Because it was not known at that time how long the non-consenting integrated defendants would be permitted to remain integrated, they limited their request for an extension to this date in the hope that conditions by then would sufficiently improve to make possible a successful reorganization. The Department refused to agree to a postponement beyond May 8, 1950, for the stated reason, among others, that it feared that its agreement to a later date might embarrass it in setting a time for the reorganizations of those integrated defendants, (Loew's Incorporated, Warner Brothers Pictures, Inc., and. 20th
[fol. 308] Century-Fox Film Corporation) which had not entered into consent decrees.

As a condition to its consent the Department required the RKO defendants to agree to the amendment of their

Consent Decree so as to provide that from and after November 8, 1949 RKO Radio Pictures, Inc. would cease to be free to license without restriction pictures produced or distributed by it to theatres in which Radio-Keith-Orpheum Corporation should have a proprietary interest of ninety-five per cent or more.

On application to this Court, the Consent Decree of November 8, 1948 was amended accordingly by order dated October 10, 1949.

On February 8th of this year this Court entered its final decree herein against the integrated defendants hereinabove named and directed that they should effect divorcement of their production and distribution branches from their exhibition branches by February 8, 1953 and that pending such divorcement these defendants should remain free to license without restriction, pictures produced or distributed by them to theatres in which they have a ninety-five per cent or greater interest.

The circumstances which compelled RKO in July of last year to seek an extension of the time for its reorganization have not improved but, on the contrary, have substantially worsened. The general level of box office receipts (the primary index of results or operations in the motion picture industry), has continued to decline. Under these circumstances RKO has been unable as yet, because of its peculiar circumstances, to accommodate its production and distribution operations to the changed conditions. At the time when the attorneys for RKO were negotiating with the Depart-
[fol. 309] ment of Justice for the extension previously granted, inquiry was made by the Department whether, if the then petition for extension were granted, RKO would seek a further extension. They replied in substance that the directors earnestly hoped no further application would be necessary but, in the event that conditions did not improve as anticipated, the directors would be compelled to seek a further postponement.

The financial condition of the Picture Company remains critical and additional time is essential if the New Picture Company is to commence its independent existence without seriously prejudicing its opportunity for sound and successful operation.

In the view of the directors the reorganization plan makes provision for working capital for the New Theatre Company which is deemed adequate under existing conditions and circumstances.

However, the situation of the Picture Company is different. Adequate initial working capital can only be provided for through arrangements which will

(1) continue the existing very satisfactory revolving bank credit or obtain substitute banking credit, and

(2) provide for the New Picture Company additional initial working capital in the amount required.

[fol. 310] The adequacy of the $10,000,000 of additional initial working capital will depend upon the results of the negotiations for continuance or substitution of the revolving bank credit and upon the results of the operation of the Picture Company. Due to the continuance of unsatisfactory operating results of the Picture Company the Directors have not been able to consummate arrangements for continuing the banking credit requirements of the new Picture Company upon which the successful carrying out of the plan of reorganization depends.

RKO accordingly requests that the time in which it must complete divorcement of its production-distribution branches from its exhibition branches be extended to February 8, 1953, the date set by this Court for the like reorganizations of Loew's, Inc., Warner Brothers Pictures, Inc. and 20th Century-Fox Film Corporation.

Although its operations in 1945 and 1946 were profitable, RKO Radio Pictures, Inc. sustained a net loss before taxes of $3,517,440 for 1947, $5,263,750 for 1948 and $3,692,415 for 1949. These losses were due primarily to a combination of three factors, viz.: the amortization, during a period of declining box office receipts, of a number of high cost and relatively unsatisfactory feature pictures produced by previous management; the progressive restrictions upon doing business in foreign countries and upon conversion of foreign funds into dollars; and, generally, the continuance of the unforeseen decline in domestic and foreign box office receipts. It is estimated that the loss of the Picture Company for the first quarter of 1950 will be approximately $1,000,000.

The losses over the past few years taken in conjunction with the under-capitalization of the Picture Company mentioned above, have created a very unsatisfactory financial position and serious problems for the Picture Company. [fol. 311] Such losses have been a constant drain upon its cash resources, with the result that it has substantially no free cash resources, even though the parent company has advanced $2,000,000 to the Picture Company in the last year.

As heretofore stated the reorganization plan as formulated and approved by the stockholders provides for the new Picture Company starting operations with additional initial working capital of $10,000,000 to be obtained by the transfer of this amount from the Theatre Company. Due to continued unprofitable operations of the Picture Company it seems likely that this will have to be redetermined before reorganization is effected.

Apart from its need for working capital, the New Picture Company, in order to maintain the substantial picture inventories required by the present selling and distribution methods of the industry, must also have an assured source of banking credit. For the past several years the Picture Company has had a revolving fund credit arrangement, bearing interest at 2.5% per annum with Bankers Trust Company of New York, Security First National Bank of Los Angeles and The First National Bank of Boston. This provides a maximum credit of $16,000,000 scaling downward at the rate of $500,000 annually and extends to April 1952. The maximum borrowing permitted under the revolving fund after April 30, 1950 will be $8,500,000. Because of present and prospective operating conditions and circumstances the directors believe that it may be essential, not only to provide for a continuation of this credit on the existing favorable terms but to expand somewhat the banking credit available to the Picture Company. For substantial periods of time RKO in the past has borrowed in amounts in excess of the maximum borrowing presently permitted under the revolving bank credit and at one time borrowed the maximum ever permitted, namely, $10,000,000. At the present time RKO is borrowing under this arrange- [fol. 312] ment, $7,500,000, and it is contemplated that it

will be necessary within the next month or two to utilize the balance of the available credit of $1,000,000.

This credit is unsecured and is otherwise on exceptionally favorable terms. The directors are satisfied that if reorganization is compelled at this time, no arrangement on terms approaching those of the present credit can be secured.

The carrying out of the proposed reorganization will constitute a default under the terms of the present credit which will enable the banks to demand immediate liquidation of all debt thereunder. To date the banks have indicated an unwillingness to permit the credit to continue beyond the date of consummation of reorganization. Accordingly, the Picture Company must be prepared, if need be, to liquidate its entire banking debt at that time. Unless it shall have, in the meantime, worked out some arrangement for continuance of a line of banking credit after reorganization, this will have to be done by using a substantial part of the $10,000,000 of additional initial working capital heretofore referred to. This would leave the new Picture Company with wholly inadequate cash resources.

From the above it is clear that the banking credit situation of the Picture Company is critical. The directors are satisfied that no satisfactory credit arrangement can be hoped for unless the new Picture Company emerges from the Reorganization as a financially sound operating unit. On the other hand they have every reason to believe, based upon previous negotiations with the banks involved, that the banks will extend the existing arrangement when the financial responsibilty of the Picture Company becomes apparent through improvement in its operations.

[fol. 313] It is apparent to the directors that, with the indicated near-term exhaustion of this line of credit, and the inability to determine prior to May 8, 1950 the amount of additional working capital to be provided the new Picture Company under the Reorganization Plan, it is essential that it be protected for a further period from adverse circumstances, and conceivably serious financial straits, by the ability to obtain intercompany financing by loans from the present parent company.

Like any other motion picture production and distribution

unit, in order to constitute a successful enterprise, RKO must be assured of a steady flow of motion picture product, satisfactory both as to cost and quality, so as to obtain the maximum results from distribution. This flow is brought about only through the combination of a satisfactory production rate and its then backlog or inventory of completed motion pictures.

Since the entry of the Consent Decree a thorough reorganization of production facilities has been carried out by the new management. Production commitments and contracts have been reduced and liquidated, and management and personnel have been materially reduced. Studio overhead alone has been cut by almost $2,000,000 per annum. During this period of reorganization, production for 1949 was necessarily at a very low rate. The rate of production, however, increased toward the end of 1949 and is continuing to do so. As of March 4th of this year the Picture Company had a backlog of eleven completed features for release this year, of which seven are classed as "A" pictures. It had in production ten additional features, of which eight will be "A" pictures, which it plans to release during this year. It is now expected that the Picture Company will have been able to put into effect this year a production program which will supply the number of quality features necessary to put [fol. 314] it on a financially stable operating basis. The effect of the economy measures already undertaken and the plans for increased production of high quality low cost features should commence to show in the next year's operating results of the Picture Company.

RKO must be a strong factor in the production of pictures if it is to furnish the competition which the public interest demands. Even if it were possible mechanically to complete divorcement by May 8, 1950, divorcement within that time would mean that the New Picture Company would be in no financial position to compete effectively with the production units of the other integrated defendants. This would not be in the interests of either the public or the RKO stockholders.

It is therefore the judgment of the officers and directors of RKO that a substantial extension of time for completion of the Reorganization Plan is necessary to enable the Pic-

ture Company to improve its financial and operating condition. In the meantime, efforts looking toward improvement of the financial and operating condition of the Picture Company will be greatly aided if the present parent company can continue to render financial support to the Picture Company, the main source of which comes from dividends from the theatre companies.

On February 8th of this year, this Court entered its final decree against those defendants which did not enter into consent decrees and there directed that Loew's, Incorporated, Warner Brothers Pictures, Inc. and 20th Century-Fox Film Corporation divorce their production and distribution units from their exhibition units by February 8, 1953.

The effect of this decree is to leave RKO, which is the smallest and weakest of the integrated companies, faced with having to start out as a non-integrated company and [fol. 315] for three years to compete with three strong integrated companies. This creates a situation the undesirability and unfairness of which the plaintiff itself was quick to recognize at the time. At the hearing before this Court on January 18, 1950, the plaintiff proposed that the reorganizations of Loew's, Warner Brothers and 20th Century-Fox should be effected within eighteen months. Counsel for these defendants opposed this, stressing that the plaintiff itself had previously proposed that such reorganizations should be effected within five years. The plaintiff's attorney stated that the reason the plaintiff was now asking for eighteen months for divorcement of the non-consenting defendants instead of five years was because it had meanwhile made consent decrees with RKO and Paramount providing for their reorganizations within eighteen months. In the light of this, plaintiff's counsel stated that ". . . it would be quite unfair to these two defendants (Paramount and RKO) who now enter the competitive arena both with respect to exhibition and distribution to allow these defendants (Loew's, Warner Brothers and 20th Century-Fox) to continue to have theatres at the same time as being engaged in the distribution business." The plaintiff has therefore frankly taken the clean-cut position before this Court that it would be unfair and discriminatory to permit the non-consenting defendants to continue to carry on their opera-

tions as integrated companies for a substantial period of time, in competition with the two companies which had previously agreed to divorcement voluntarily.

It seems logical that if RKO had participated with the three other integrated companies in their continued defense of the case, the plaintiff would have asked for and this Court would have granted RKO the same date for divorcement as has now been given to its integrated competitors. It [fol. 316] would seem decidedly unfair, particularly when the circumstances which now place it in this position were unforeseen and beyond its control, that RKO should now be penalized competitively for the next three years simply as the result of its having been the first of the integrated defendants to enter into a consent decree.

Paramount Pictures, Inc. has already accomplished its divorcement. That company, however, was in a position to commence non-integrated operation with a profitable and soundly financed production company. It did not have RKO's problem of having to reorganize, as a separate and financially independent company, a production branch which has heretofore been financially dependent on its exhibition branch. The relative profit and loss showings of the two picture companies since 1945 show the following:

	RKO Picture Company net losses or profits (before taxes)	Paramount Picture Company net profits (before taxes)
1945	$3,621,966 profit	$18,318,822 profit
1946	8,416,387 profit	32,306,065 profit
1947	3,517,440 loss	18,118,289 profit
1948	5,263,750 loss	6,475,396 (nine mos.) profit
1949	3,692,415 loss	no figures available

It has been the history of the industry within the integrated companies that the theatre companies have been stronger financially than the production companies. With the advent of separate operation, basic changes must come to pass which will enable the picture companies to operate with consistent profits as separate units, but these changes must be of a somewhat gradual nature as the adjustment progresses. RKO Radio Pictures, Inc. should be given time within which to make the necessary adjustments in the economics of the business so that it can stand alone. [fol. 317] The operations of RKO's Picture Company have

never been consistently profitable and it has never been able to develop the backlog of cash resources which the production and distribution units of the other integrated companies have enjoyed. Because of this the benefits flowing from integration are much more pronounced in the case of RKO than in the case of the other integrated companies. Because of the volatile operations of a picture company and the traditionally weakened position of the RKO Picture Company, fluctuations in its operations place a strain upon the Picture Company and make more critical the effect in its case of radical changes in box office conditions. Accordingly, the change from an integrated operation to a non-integrated operation will be much more precarious in the case of RKO Radio Pictures than the similar change in the case of other integrated picture producing and distributing companies.

In the instant case integration has not been found to have been in itself illegal. Divorcement has been ordered simply as one means of making more certainly effective those provisions of the Consent and Final Decrees which are designed to restore competitive conditions in the motion picture industry. To require RKO at this time, and for a period of nearly three years to come, to compete as a non-integrated company, with inadequate working capital, against the other three integrated companies would undoubtedly further greatly handicap RKO in competing in the production of feature motion pictures.

RKO also asks that its Consent Decree as amended on October 10, 1949 be modified to permit it, until reorganization, to license its pictures without restriction to theatres in which it has a proprietary interest of ninety-five per cent or more.

[fol. 318] Section VI of the original RKO Consent Decree entered on November 8, 1948 provided that it could license its pictures for exhibition in its theatres without restriction until completion of its reorganization. When it became necessary, in the summer of 1949 for RKO's attorneys to request plaintiff's attorneys for their consent to an extension of time to complete divorcement, plaintiff's attorneys refused to consent unless the Decree was also amended to

prohibit the Picture Company, after November 8, 1949, from licensing its pictures without restriction to RKO theatres. Solely because of its immediate and pressing necessity for further time RKO accepted the plaintiff's condition and the Consent Decree was amended accordingly (Amended Decree Section VIB).

Since then however, this Court's final decree has been entered against the non-consenting integrated defendants leaving these defendants free to license their product to their theatres without restriction until February 8, 1953. This decree provides:

"V

Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

Thus this Court, in the case of the nonconsenting integrated defendants, has taken the realistic view that during [fol. 319] the period they are permitted to remain integrated they should continue to be free to operate fully as integrated companies and to avail themselves of the economic benefits that are inherent in integration.

RKO now asks that Section VI in its original Consent Decree be reinstated and that the time within which it was there permitted to license its product to its theatres without restriction be extended to the time within which this Court directs that its divorcement be completed. Justice would seem to demand that RKO should not be required to go through its period of reorganization under any greater burden or competitive disadvantage than its competitors.

In the interest of affording the Picture Company every reasonable opportunity to strengthen its financial position pending reorganization it is of the utmost importance that

it be in a position to exploit its pictures as effectively as possible. In this respect the theatres operated by RKO serve an unique and useful function in the advertising of features it distributes. Although RKO owns fewer theatres than other integrated defendants, a high percentage of them are "show case" theatres, the largest theatres in the largest cities. This Court found:

> "The ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres" (Finding of Fact No. 122, R. 3685).
>
> "The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors" (Finding of Fact No. 123, R. 3685).

[fols. 320-322] For the reasons stated it is respectfully requested that the Consent Decree as to the RKO defendants, heretofore entered herein, and as amended be modified in the respects specified.

Ned E. Depinet.

[fol. 323] In United States District Court

Order on Motion to Amend Decree

The Court, having considered the application of the defendant, Radio-Keith-Orpheum Corporation, for the modification of Sections IV, V, VIA and VIB of the Consent Decree as to the RKO defendants, dated November 8, 1948, and as amended October 10, 1949 and the Consent thereto of Howard R. Hughes; and

It appearing that such modification should be ordered;

It Is Hereby Ordered, Adjudged and Decreed as follows:

The Consent Decree as to the RKO defendants, dated November 8, 1948, as amended October 10, 1949, is hereby modified as follows:

(1) By deleting from Section IV of said Decree, as amended, the words "Commencing eighteen months after the entry of this Decree" and by substituting therefor "On or before February 8, 1953";

(2) By deleting from the first paragraph of Section V of said Decree, the words "Within a period of eighteen months from the date hereof" and by substituting therefor "On or before February 8, 1953";

(3) By adding to Section VIA of said Decree, as amended, after the words "RKO Radio Pictures, Inc." the words [fols. 324-325] "during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur by February 8, 1953,";

(4) By deleting from Section VIB of said Decree, as amended, the words "From and after November 8, 1949," and by substituting therefor "From and after the effective date of the reorganization of the RKO defendants,".

——, United States Circuit Judge; ——, United States District Judge; ——, United States District Judge.

[fol. 326] In the United States District Court

[Title omitted]

Notice of Motion for Appointment of Trustee

To: Donovan Leisure Newton Lumbard & Irvine, 2 Wall Street, New York 5, N. Y., Clifford & Miller, 1523 L Street Northwest, Washington, D. C. Counsel for RKO defendants and Howard R. Hughes:

Upon the statement annexed hereto and made part hereof, upon all the proceedings had herein and in Equity No. 87-273,

The plaintiff will move this Court on April 19, 1950, at the Federal Court House at Foley Square, New York, at 10 A.M. or as soon thereafter as counsel may be heard, for the entry of an order appointing a trustee and for other relief, as provided for in the order attached hereto.

(S.) Philip Marcus, Special Assistant to the Attorney General. Harold Lasser, Attorney.

Donovan Leisure Newton Lumbard & Irvine, Clifford & Miller.

[fol. 327] IN THE UNITED STATES DISTRICT COURT

ORDER FOR APPOINTMENT OF TRUSTEE

After hearing counsel for the Government and for the RKO defendants on April 19, 1950, and upon due consideration of the motions filed by the Government on April 14, 1950 and by the RKO defendants on April 12, 1950,

It is ordered that ——— ——— ——— be and hereby is appointed Trustee for the purpose of taking over the businesses and assets of defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation in order to effect as expeditiously as possible a divorcement of the exhibition interests of said defendants from their production and distribution interests as provided for in the Preamble to the Consent Judgment herein of November 8, 1948 and in Sections II B, III E, IV, and V thereof.

(1) The Trustee shall have the power to employ counsel and all necessary assistants in order to carry out this order of the Court, including, if he desires, present employees of defendant companies.

(2) The Trustee shall forthwith cause two new holding corporations to be formed, one of which will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the production and distribution of motion pictures, and the other of which will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the exhibition of motion pictures. The [fol. 328] Trustee shall cause the bylaws of each corpora-

tion to provide that after one year from the date of incorporation, no stockholder who holds stock in the other corporation shall hold 1% or more of its stock, that this bylaw shall not be changed without permission of this Court, and that voting and dividend rights of such stock shall be suspended during the period when such dual interest shall continue. The bylaws shall provide that stockholders holding 1% or more of the stock of one of the new corporations shall file an affidavit with the corporation and with this Court as to any interest he may have in the other corporation.

(3) The Trustee shall thereupon cause Radio-Keith-Orpheum Corporation to be dissolved and cause the stock of the new picture company and of the new theatre company to be distributed among the stockholders of Radio-Keith-Orpheum Corporation, share for share, provided, however, that the Trustee shall retain all shares of stock the owner of which has as much as 1% of the stock in one of the new companies and has stock in the other company. The Trustee shall exercise voting rights with respect to the stock so held and shall retain one half of any dividends paid on such stock. Said withheld dividends shall be paid over to such stockholders at the time their stock is returned to them by reason of their no longer having such interest in both companies. As to shares of stock held by the Trustee, he shall issue certificates of beneficial interest to the holders of record of such shares.

(4) Howard Hughes is hereby directed to cause to be turned over to the Trustee the certificates representing all the shares of stock held by him in any of the said defendants, and the Trustee shall retain equivalent shares of stock issued by each of the new companies. Within 30 days after the appointment of the Trustee, Howard Hughes shall file [fol. 329] with the Trustee a statement as to which one of the two companies he desires to retain a stock interest therein. The Trustee thereupon, if the new corporation shall have issued their stock, shall cause the company selected by Howard Hughes to issue additional equivalent shares and shall cause the company rejected by Howard Hughes to cancel the shares of stock issued to Howard Hughes; if the new corporations shall not have issued such stock at the time Howard Hughes makes known his choice,

there shall be issued to him an equivalent number of shares of stock by the company with which he selects to remain. Upon failure of Howard Hughes to make his choice within said 30 days, the Trustee shall promptly endeavor to sell the shares issued by the new companies in lieu of Hughes' stock in Radio-Keith-Orpheum in such wise that no purchaser of any of such stock shall own more than 1% of shares in any one of the said companies and have an interest in the other company. No such sale shall be made to a defendant, owned or controlled by a defendant, or affiliated with a defendant or their successors. Sale shall be subject to approval of the Court upon notice to the parties.

(5) Upon the incorporation of the new companies, the Trustee shall cause a complete separation of offices and facilities to take place and shall effect a complete separation in management of these companies as required under Section IV of the Judgment of November 8, 1948. The Trustee shall cause the respective companies to file the consents required under Sections II B and III E of said judgment. And said companies shall be under a continuous obligation to carry out the judgment.

(6) The RKO defendants and Howard Hughes are hereby ordered to cooperate fully with the Trustee in carrying out this order, including the execution of all necessary documents.

[fol. 330] (7) The Trustee's compensation and expenses shall be paid by the RKO defendants and their successors, provided, however, that one half thereof shall be paid by Howard Hughes for the period required to dispose of his stock interest as provided for in this order and the Judgment of November 8, 1948.

(8) The Trustee shall be subject to removal by the Court in its discretion, and in the event of his removal or death, resignation, or inability to act, the Court shall appoint his successor.

(9) The Trustee shall be accountable for action hereunder only in proceedings in this cause, and shall not be liable for any loss or default unless resulting from gross negligence or wilful misconduct.

(9) The Trustee may make application to the Court at any time for such further orders or directions as may be

necessary or proper in connection with the administration of his trust.

(10) The trusteeship shall terminate upon the filing by the Trustee and the approval by the Court of a statement that this order has been carried out, that there is no more trust function to be performed, and that divorcement has taken place in accordance with the Judgment of November 8, 1948.

Dated: —

——— — ———, United States Circuit Judge, ——— — ———, United States District Judge, ——— — ———, United States District Judge.

[fol. 331] IN THE UNITED STATES DISTRICT COURT

STATEMENT—April 13, 1950

On March 21, 1950, the present management of the RKO defendants caused a motion to be filed in this Court for the purpose of being relieved of an obligation to perform part of the divestiture required by the Consent Judgment entered in this cause on November 8, 1948. That motion is pending before this Court.

On April 12, 1950, the present management of the RKO defendants caused another motion to be filed in this Court. That motion asks for the vacation of the obligation of the RKO defendants to carry out the divorcement of their exhibition interests from their distribution interests as required by the Judgment of November 8, 1948, as amended on October 10, 1949. It asks for the vacation of the obligation of Howard Hughes to dispose of his stock interest in the RKO defendants as required in the Judgment of November 8, 1948, as amended on October 10, 1949. It asks permission for the RKO defendants to continue to prefer their own theatres and to be relieved of the obligation under the Judgment to discontinue such preference.

The RKO defendants and Howard Hughes have shown no intention of carrying out the commitments they have made to this Court and to the Government under the judgment

entered on November 8, 1948. It is submitted that the public interest which exists not only in expeditious effectuation of the competitive condition in the motion picture [fol. 332] industry called for by the judgment. The public interest, moreover, requires that the parties carry out the mandate of this Court, and if they fail to do so, that the Court take steps necessary to enforce its decree. We may add that there is also a deep public interest in giving finality to consent decrees.

We respectfully ask, therefore, that the Order for the Appointment of a Trustee, attached hereto, be entered by the Court.

Dated: April 13, 1950.

Philip Marcus, Special Assistant to the Attorney General.

[fol. 333] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT IN SUPPORT OF PLAINTIFF'S APPLICATION AND IN OPPOSITION TO DEFENDANT RKO'S APPLICATION—April 5, 1950

In the first part of this memorandum, we shall present arguments in support of the Government's application for the appointment of a trustee to effect a dissolution of RKO's interest in Metropolitan Playhouses, Inc. and Gifts Inc. In the second part of this statement, we shall present arguments in opposition to RKO's application for approval of a plan it has submitted to this court with respect to its interest in those two corporations. It should be noted, however, that in advancing arguments in opposition to the defendants' application, the position taken in a number of instances will at the same time support the Government's application. Since our major concern is RKO's interest in Metropolitan Playhouses, Inc., this statement will deal largely with that interest. The plan proposed by the Government, however, is logically applicable, also, to Gifts Inc.

On November 8, 1948, a consent judgment was entered against the RKO defendants in the case known as the *Para-*

mount case. This was the first judgment entered in that case after this Court had entered a judgment on the mandate of the Supreme Court.

Section III A 9 of that judgment prohibited the RKO defendants from acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres in which such interest existed. A great number of such theatres are in metropolitan New York. There are some 130 theatres in [fol. 331] the metropolitan New York area controlled by Metropolitan Playhouses, Inc., in which the RKO defendants have had for a considerable number of years a 20% interest. United Artists Theatre Corporation owns 50% of the class A stock of Metropolitan, and Spyros Skouras, Charles Skouras, George P. Skouras, and Athenaseus Skouras own 30% of the class A stock.

As this Court is aware, United Artists Theatre Corporation has had joint interests in many parts of the country with many of the defendants in the *Paramount* case, and the defendants have been required to terminate such interests. United Artists Theatre Corporation is one of the larger theatre circuits in this country. Spyros Skouras, of course, is the president of 20th Century-Fox; Charles Skouras heads National Theatres Corporation, under which all of Fox's interests in theatres are subsumed, except the Roxy Theatre in New York City; George P. Skouras is the operating head of Metropolitan Playhouses, Inc. Metropolitan Playhouses, Inc. also has a 50% interest in Skouras Theatres Corporation and Randforce Amusement Corporation, both of which operate theatres.

The judgment provides that this joint interest in enumerated theatres should be terminated within one year from the date of the judgment and expressly states that the RKO exhibitor-defendants or the new theatre company resulting from divorcement cannot retain more than four such theatres located in New York City. It is also expressly provided in section III paragraph 9(b) that as to the remainder of the theatres listed, including all others of the listed theatres in New York City, RKO should terminate such relation by sale or other disposition of the interest of RKO either to a co-owner or co-owners or to *a party not a defend-*

ant and not owned or controlled by or affiliated with a defendant in this cause.

[fol. 335] Article IV of the judgment provides that commencing one year after the entry of the decree, the new theatre company and the new picture company should be operated wholly independently of one another and be enjoined from attempting to control and influence the business or operating policy of the other by any means whatsoever. Section VIII of the decree provides that jurisdiction be retained by the Court for the purpose of enabling any of the parties to apply to the Court for an order or direction necessary or appropriate for the modification or carrying out of the decree and for the enforcement or compliance therewith. The Government's application is grounded on the aforesaid jurisdictional provision.

Prior to the expiration of the year after the entry of the judgment, the RKO defendants procured from this Court an extension of time to dissolve certain of their joint interests including the ones above mentioned until November 16, 1949. On November 18, 1949, the Court, upon the application of the RKO defendants, and without objection of the Government, modified the judgment so as to provide that RKO, subject to the provisions of subparagraphs (a) and (b) of section III A 9 of the consent judgment, should on or before February 16, 1950 elect several courses of actions with respect to the disposition of its interests in Metropolitan Playhouses, Inc., Gifts Theatres, Inc., and certain other companies. This amendment gave the RKO defendants the choice, among others, to present to the Court a definitive plan or plans for compliance with section III A 9 of the judgment, and it was provided that the Court should set a period of time for the consummation of such plan. This was premised upon RKO's not having disposed of their interests in certain corporations by February 16, 1950. RKO did not dispose of such interests by that date, and secured extensions of time until March 22, 1950. It now has submitted a plan which is to be heard by your Honors on April 17 of this year.

[fol. 335a] If there are any clear cut examples of fruits of the conspiracy in this case, it is that of the joint interest of the sort RKO has with Metropolitan Playhouses, Inc. Not

only did RKO enjoy profits or revenues arising from the operation of some 130 theatres in the metropolitan New York area through this joint interest for many years prior to the time of the trial, but even since the judgment it has continued to enjoy the rewards of its own wrongdoing. It is now almost a year and a half since the entry of the judgment against RKO, and it has not disposed of its interest in Metropolitan Playhouses, Inc. and Gifts, Inc. A trustee should be appointed, therefore, to effect disposition of RKO's interest in Metropolitan Playhouses, Inc. and in Gifts, Inc. The plan we propose is simple and is similar to that which has been used in other antitrust cases.

The plan proposed is in accordance with the expressed provisions of the judgment and the aims of this suit, that is to effect a disposition of the RKO interest in Metropolitan Playhouses, Inc. It is designed to result in RKO's not having any further interest in the corporation or the theatres held by the corporation, except the four theatres provided for in the judgment. There are no ironclad restrictions on the right of the trustee to effect a disposition of this interest of RKO except that his recommendation must meet with the approval of this Court. It is believed that this Court will protect the interests of the public, RKO, and the Government in this matter, and that the trustee should not be restricted in effecting such disposition by standards set up at the request of the defendants.

We have also proposed that the decree be modified so as to prohibit the RKO defendants from disposing of their interests to circuits arising from divorcement. This is a provision which has become ensconced in judgments subsequent to that of RKO, when it became apparent that the method of divorcement used commonly created theatre circuits.

[fol. 336] Without disputing RKO's statement on page 2 of its proposed plan that it has been unable to dispose of its stock on fair terms, we think this very statement requires the appointment of a trustee who will be empowered to dispose of said stock primarily with a view to insure competition and dispose of RKO's interest, and not primarily on the basis of what might be fair terms to RKO.

In paragraph 3 on page 2 of its proposed plan, RKO pro-

poses to limit the choice of the Court with respect to appointment of a trustee to one among five New York banks. We do not think that there should be any such limitation. In appointing a trustee, we think the Court should properly consider whether the trustee has such interest in RKO in the way of investment or financing as to suggest the possibility of a conflict of interest in effecting a disposition of RKO's interest under the consent judgment. For instance, the first name suggested by RKO is the Bankers Trust Company of New York, but it is our understanding that it is one of the companies which has been furnishing RKO with a revolving fund credit.

Paragraph 4 on page 3 of RKO's proposed plan provides for the issuing of certificates by the trustee to RKO, and gives RKO the right to pledge or hypothecate all or any part of such security and any indebtedness which it may presently owe or may thereafter incur. Under the previous paragraph upon which we have commented RKO could pledge or hypothecate these certificates to the trustee, which would clearly create a situation which should not be sanctioned by this Court. We think it inconsistent with the requirement that RKO dispose of its interest in Metropolitan Playhouses Inc. that it be given the right to use these certificates as if the stock they represent is not to be disposed of. If there is to be any such right, the terms upon which it may be exercised should be spelled out. Such privilege should certainly not be any broader than RKO's rights under the consent judgment with respect to its stock in Metropolitan.

[fol. 337] Again, paragraph 5 on pages 3-4 of RKO's plan would permit the trustee to elect its own employees as directors of RKO. This is clearly objectionable if the trustee has any financial interest in RKO which might be affected by disposition of RKO's interest in Metropolitan.

Paragraph 6 on page 4 of RKO's plan would permit RKO to draw dividends from Metropolitan no matter how long the trust continued. For many years RKO has reaped the rewards of its illegal relationship in Metropolitan. Although it was supposed to terminate that relationship some six months ago, it has continued to reap those rewards. We think that for a year the dividends should be withheld

entirely or at most they should receive 50%, as stockholders do under the Paramount consent judgment. If the trusteeship should have to be continued after a year, RKO should be denied any right to any dividends from Metropolitan or Gifts, Inc. thereafter accruing. There is, otherwise, no incentive on the part of RKO to facilitate the disposition of its interest in Metropolitan Playhouses, Inc. and permits RKO to enjoy in full the benefit of the operations of Metropolitan Playhouses, Inc., from which it was required to be separated some six months ago and which interest has been part of the illegal conspiracy in this case.

The second sentence of paragraph 8 of RKO's proposals would have the effect of *modifying* the consent judgment by permitting RKO to retain their interests in theatres now owned jointly with other exhibitors, provided the interests of such other exhibitors were acquired by investors.

Paragraph 9 on pages 5 and 6 of RKO's proposed plan would permit Columbia or United Artists or Universal to acquire an interest in one of the largest circuits in the metropolitan New York City area and would permit the formation of the very type of integration so misused in this case. [fol. 338] It is squarely inconsistent with section II A 9(b) which provides:

> As to the remainder of the theatres above listed, including all other of such listed theatres located in New York City, the RKO exhibitor-defendants shall terminate such relation by a sale or other disposition of the interest of RKO therein, which may be either (1) to a co-owner or co-owners; or (ii) *to a party not a defendant and not owned or controlled by or affiliated with a defendant in this cause.* (Italics supplied.)[1]

This provision was one of the major points insisted upon by the Government as a condition for entering into a consent decree. It is an essential part of this Court's judgment.

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[1] On January 18, 1950, long after the entry of the consent judgment, RKO secured from this Court a severance judgment, but there is no question the consent decree was entered in the *Paramount* case and that "defendants in this cause" are other defendants in the *Paramount* case.

Its vacation would call for an entire reconsideration by the Government of its position with respect to the RKO defendants which was crystallized in the consent judgment entered against them.

The consent judgment entered against another defendant contains the same limitation. This is so because the Little Three joined in the conspiracy which used these theatres to carry out that conspiracy. The effect of this part of the proposal would be to put RKO and the Little Three in a preferred position with respect to the RKO theatres.

Moreover, this proposal might take from the scrutiny of the Court an application by some other large circuit in New York to acquire this interest in Metropolitan Playhouses, Inc., where the combination of such interest might be so large and so ridden with the potentiality of monopoly that this Court might not desire to approve such sale or purchase. [fol. 339] This proposal also provides that the terms of any proposal of the trustee to terminate the joint interest should be shown to be reasonable and fair to RKO, to all others interested in the corporation, and to the public, and that its consummation would yield to RKO not less than a fair market value of the shares of its interest in the theatres to be sold or otherwise disposed of. We do not think that the trustee should be compelled to make any such showing. His primary interest should be the disposition of RKO's interest in Metropolitan Playhouses, Inc., and the burden should rest upon RKO to show to the Court that it is being unreasonably injured thereby and that another expeditious means of disposition is available to carry out the consent judgment. It does not follow that if monopoly value equals fair market value, that the latter should be the floor.

Paragraph 9 of RKO's proposals suffers from the same infirmities as paragraph 8.

Paragraph 10 of the defendants' proposals provides that despite the appointment of a trustee to effect the disposition of its interests, RKO itself may at any time sell, assign, or transfer its interests in the certificates of interest to any persons, including Columbia, United Artists, or Universal other than certain named corporations. This might be construed to permit the exhibition company to transfer its

interest to the distributing company and thereby effectually flaunt the spirit and letter of the consent judgment as now written.

Paragraph 11 would permit RKO to acquire all the shares of Metropolitan Playhouses, Inc. or additional shares subject to certain qualifications. The effect of this might be to prolong the trusteeship far beyond any reasonable time, merely by RKO's acquiring some additional shares in Metropolitan Playhouses, Inc. and turning them over to the Trustee. To permit RKO to acquire all the interests in [fol. 340] Metropolitan Playhouses Inc. would surely be to defeat section III A 9 of the consent decree and to permit RKO to prolong its already over-prolonged enjoyment of the fruits of the conspiracy. For RKO to acquire all the shares and still abide by section III A 9 of the consent decree would mean that it would have to dispose of a considerable number of theatres in metropolitan New York and this in turn would necessarily be an occasion for requesting further delay from this Court.

Paragraph 12 contains the same references to standards limiting the trustee which we have pointed out as objectionable under paragraph 9. The objections there made also pertain to this proposal.

Section 13 would permit the trust to last for five years. This is an unduly long period of time when we take into consideration, as we must, the fact that the defendants are continuing to reap the benefits of the conspiracy through this period. In our proposal, we have required the disposition to be made within one year but have also provided for an application by the trustee in the event further extension is necessary. Nor do we think the accountability of the trustee should be limited to proceedings in *U. S. v. Radio-Keith-Orpheum Corporation*. If by some remote possibility the Trustee violates the Sherman Act, his liability therefor should be permitted to be terminated in any appropriate court.

Paragraph 17 of the defendants' proposals provides for the renewal or resignation of a trustee similarly limited to the banks specified in paragraph 3. The same objections that pertain to that earlier paragraph appertain to this one.

In summary, the major objections to RKO's plan are:

1. It is contrary to one of the basic premises of the RKO consent judgment embodied in section III A 9(b) of the decree that defendants in the *Paramount* case should not be allowed to acquire their co-defendants' interest in theatres. [fol. 341] 2. The plan is not limited in terms to the theatre company but would actually permit RKO as a distributor to continue to have an interest in theatres.

3. It sets up too rigid standards for trustee and too rigidly limits the Court in its discretion as to whom to appoint as trustee.

4. Its provisions contain no incentive to effect a prompt disposition of RKO's interest.

5. Its very complexity invites constant recourse to this Court on a matter which should be finally disposed in its own narrow compass.

6. For all these reasons, we respectfully submit that the Government's plan be adopted and that RKO's plan be rejected, and that section III A 9(b) of the judgment of November 8, 1948 be modified to include a prohibition against disposition to circuits arising out of divorcement.

Dated: April 5, 1950.

Philip Marcus, Special Assistant to the Attorney General.

[fol. 342] In United States District Court

[Title omitted]

Transcript of Oral Argument

Before Hon. Augustus N. Hand, C. J.; Hon. Henry W. Goddard, D. J., and Hon. Alfred C. Coxe, D. J.

New York, April 19, 1950; 3:00 o'clock p. m.

Appearances:

For the Government:

Irving H. Saypol, Esq., United States Attorney; By Philip W. Marcus, Esq., Special Attorney to the Attorney General, and Harold Lasser, Esq., Special Attorney.

[fols. 343-345] Thomas A. Slack, Esq. (of the Texas Bar), Attorney for Howard R. Hughes.

[fol. 346] Mr. Donovan: Now I come, if it please your Honor, to our motion for an extension of RKO's time to organize.

RKO is here because it finds itself forced by serious unforeseen and unforseeable difficulties in carrying out its dissolution within the eighteen months directed by this Court with the consent of the Department of Justice. In point of fact, your Honors, we had to pay a price for the last six months we got, because in the negotiations for postponement with the Department in the fall of 1949 we were confronted with the statement of the Department that not only would they not give an additional period of one year, which we asked, but the Department refused to agree to a postponement in excess of six months, and then only for the [fols. 347-355] period of six months if RKO would consent to a condition, and that condition exacted from no other company. And that condition was that RKO would surrender its rights under the Consent Decree to license pictures it distributes to its own theatres. And that was done, and upon those conditions we got the extension of time.

Now, in this situation, when the Department refused last week to grant its consent to this postponement, then we were compelled to file this motion. And then the Government, and I think the word is right, the Government retaliated by filing a paper in this Court in which they asked for the appointment of a trustee to take over the assets, management and operation of RKO and to effect, without the consent of RKO stockholders, drastic changes in the plan of reorganization which the shareholders have approved, and to impose upon those shareholders confiscatory penalties.

[fol. 356] Mr. Marcus: The answer is no.

Well, your Honors, I would like to point out at the outset that it is not only RKO which is making this application; in fact it is Howard Hughes. And in that connection I may say that we have received a number of protests from other stockholders of RKO against the granting of any further extension to RKO.

If there are any of such stockholders in court today, your

Honors, I would venture to say that it would be helpful to the Court, in deciding these motions, if it would grant a [fol. 357] short period of time for such representatives to make known their views.

Mr. Donovan: Are there any such here, Mr. Marcus?

Mr. Marcus: I understand there are.

Mr. Alfred Berman: Your Honors, I communicated with Judge Hand's office yesterday afternoon and this morning to advise them that I would appear to request leave of the Court to address the Court briefly on behalf of a certain minority but substantial stockholders who my firm represents. Judge Hand of course stated through his secretary that he could not agree to grant me time but that I would have an opportunity to ask leave.

When the moving parties have concluded their argument we should like a brief opportunity.

Judge Hand: Is there anybody else?

Mr. Paul Kern: My name is Paul Kern. I — a member of the District Court of the Southern District and also of the Circuit Court in this circuit, and a stockholder in my own right of 4000 shares. I would like ten minutes of the Court's time.

Judge Hand: How many shares?

Mr. Kern: 4000 shares.

Mr. Berman: Perhaps I should add, your Honors, that [fol. 358] my clients own some 60,000 shares. My name is Alfred Berman, and I am associated with the law firm of Guggenheimer & Untermyer of this city.

Mr. Alfred M. Morris: Your Honors, my name is Alfred M. Morris. I am a member of this court too, and I happen to be a stockholder in my own right. I own 1600 shares of RKO at this time. It is my considered opinion that there is no doubt that if this Government action is enforced and RKO is compelled to dispose of its assets within this short period of time, by May, or a trustee will be appointed, I think that there will be great loss to the stockholders; there will be no gain to the individual small stockholder whatsoever, and the stock market shows it at the present time, if we are aware and we watch the thing. The stock has come down to 7-⅜ at this time, whereas in 1945 the stock was selling at 28-⅛.

Judge Hand: A minority interest is opposing what the directors think it is advisable to do.

Mr. Kern: That is right.

Mr. Berman: I will take a position on behalf of our clients that the action of the company in making this motion is ultra vires and invalid because it is wholly contrary to the action adopted by the stockholders at their last meeting which required the consummation of this plan by November [fol. 359] 8, 1949; secondly, that it is contrary to their financial interest, and thirdly, that it is against the public interest for a number of reasons that I would like to explain.

Judge Hand: I don't see why you are acting for the public interest. The Government is here arguing for the public interest.

Mr. Berman: I have just this to suggest on that point, your Honor. We have here a situation——

Judge Hand: And I would suggest that it would appear, if you are differing with all the majority here, that you have some interest outside of your interest as a stockholder of this company, isn't that so?

Mr. Berman: No, we do not, sir. Our interest is that of stockholders of this company, substantial but a minority. And the reason I ask leave to appear is that this company is controlled by a minority but dominant controlling stockholder—Mr. Hughes. It is our position that the company action is actually in the interest of Mr. Hughes as such, a minority controlling stockholder, but contrary to the best interest of the majority of the stockholders, on whose behalf I would like an opportunity to present these considerations. [fol. 360] Mr. Donovan: If your Honor please, may I say one word that may answer this whole thing? That it is our purpose——

Mr. Kern: Your Honor, may——

Judge Hand: Now wait a minute.

Mr. Donovan: That it is the purpose of the company, of the directors, that if this Court should find that we were entitled to a postponement, that before taking any action on reorganization or on the postponement that a meeting of the shareholders would be called, because we think that is the proper forum for the shareholders to determine this question; and let them determine in and of themselves,

1, whether they want the postponement, and 2, whether they want the terms that we have provided.

Judge Hand: Why didn't you do that in advance?

Mr. Donovan: We did have a meeting and the shareholders approved the plan.

Mr. Berman: Requiring liquidation——

Judge Hand: Wait a minute. Don't all talk at once.

They did not approve an application for an extension, did they?

Mr. Donovan: No, your Honor, they did not approve that.

[fol. 361] Judge Hand: Why didn't you make that—have a meeting to determine whether they wanted it?

Mr. Donovan: Well, the reason that was not done, your Honor, was because at the time that this extension came up the action required was immediate action. That is exactly the situation. That is why I relate all this to your Honor.

Mr. Kern: If your Honor please, I would like to——

Judge Hand: I don't see that the two of you need talk about this thing. You might delegate one.

Mr. Kern: I would like to state very briefly that the reasons advanced by the company would really mitigate against the company's purpose of extension. They lost twelve and a half million dollars in three years. They are now claiming that the picture Company is not in a position to effect reorganization and to split at this time. There is no assurance that in three years they won't lose another twelve and a half million dollars, and then the situation will be really acute, and then you will not be able to carry out the decree.

I would like to point to two further reasons which I [fol. 362] would like your Honors to hear. One of them is that the interests of Mr. Hughes are entirely divergent from the interests of the rank and file of the stockholders. There is one very important reason for that and that is he has pledged himself to divorce himself of the Theater Company completely. The decree as it now reads points out and binds Mr. Hughes to sell the Theatre Company stock and stay with the Picture Company stock only. It therefore is his interest to continue to offset the earnings of the Theatre Company. On the other hand, the interest of the rank and file of the stockholders is a divorcement,

because as soon as you have a divorcement, the Theatre Company, which is a money-making operation and has been a steady money-making operation, can pay dividends. Mr. Hughes, being in a very high income tax bracket, is not interested in dividends. The rank and file of the stockholders are interested in dividends.

There is a third reason, your Honors, why it is very important that the decree be enforced and no further extension be granted and that is this: A great number of people have on the presentations and representations in [fols. 363-364] the proxy matter changed their position. They had been trading between brokerage houses, between members of the New York Stock Exchange so-called when issued dealings in the Theatre Company stock as well as in the Picture Company stock, the two component units which are to evolve out of the reorganization.

[fol. 365] Mr. Marcus: That is right.

Now, your Honors, I come to the equities of the situation, and I might point out, firstly, that this is not merely a motion for an extension of time with respect to divorcement. There are four things which this motion attempts to do. One is to extend the time of divorcement of ownership, of its stock interest; the other is a motion to extend [fol. 366] the time for divorcement of operations. Now those two things are provided for in different sections of the judgment, but in addition a motion is made for the extension of time for Howard Hughes to make up his mind what to do with his stock. That is in the motion papers filed by RKO dealing with a section which in terms applies only to Howard Hughes' interest. Now Howard Hughes' consent judgment recites that he has a 24 per cent interest, and in addition they are asking for leave to prefer their own theatres for another three years, even though they renounced any such right when they got their prior extension, and the judgment entered at that time, the amendment entered at that time expressly provided that they could no longer prefer their own theatres. They have been preferring their own theatres for some 12 years, but in addition to that, your Honors, I myself since the time of that amendment have advised exhibitors who are in competition with RKO theatres that RKO can no longer refuse to negotiate with them for products, and many of those

exhibitors are apprised of the fact that RKO can no longer prefer its own theatres, and here we have RKO at this time trying to repudiate a solemn agreement made with the Government by which we did not oppose their application to seek to amend the judgment entered by this Court [fols. 367-371] at that time.

Judge Hand: Well, now, what application is that? I haven't got it perfectly clear in my mind. Is it an application for an extension?

Mr. Marcus: Yes. They have already got a six-months' extension.

Judge Hand: What arrangement did they make then?

Mr. Marcus: Your Honor, at that time the order which they presented to the Court provided that the judgment would be amended by fixing a date which was the then date after which they could no longer prefer their own theatres, and it was that amendment which they themselves presented to this Court which they are now seeking to vacate so they can have another three years in which to prefer their own theatres.

[fol. 372] With a great many misgivings we finally agreed not to oppose their application. But those misgivings were so strong that we insisted upon receiving from Mr. Hughes a statement that he would not again ask for an extension. And I have the letter here, your Honors, and I would like to read it.

This letter is dated September 30, 1949. It is addressed to the Attorney General.

> "On behalf of Mr. Howard R. Hughes I am authorized to state to the Department of Justice as follows:
>
> "1. In the event that the application of RKO for amendments of the RKO consent decree is approved by the Court, to which amendments Mr. Hughes consented, he will not petition for further extension of the time provided for in section 5 of such decree within which he must comply with such section.
>
> "In making this statement it is our understanding [fols. 373-374] that if prior to May 8, 1950, Mr. Hughes has not received the stock of the new Theatre Company and the New Picture Company issuable under the Plan of Reorganization, he will comply with the

requirements of section 5 (b) of such decree if he shall file with the Court by such time a statement that he has elected to deposit with the Trustee designated by the Court in accordance with section 5 (b) his shares of the new Picture Company or the new Theatre Company as he may elect, when issued to him pursuant to the plan, subject to his right to sell prior to such deposit in accordance with section 5 (a) of such decree."

Now today we find RKO and Howard Hughes repudiating that agreement. They are seeking an extension not only with respect to divorcement of RKO but with respect to section 5, which deals with Howard Hughes' stock interest.

[fols. 375-376] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF ORAL ARGUMENT

Before: Hon. Augustus N. Hand, C. J., Hon. Henry W. Goddard, D. J., and Hon. Alfred C. Coxe, D. J.

New York, February 15, 1951;
4.00 o'clock p. m.

[fol. 377] Mr. Marcus: Now, the reason that this motion is being made is that in the case of RKO we have a rather peculiar situation: The problem of divorcement with respect to the RKO defendants has been complicated by the fact that Howard Hughes several years ago acquired the controlling block of stock in that company. 24 per cent of the stock of RKO has been held by Howard R. Hughes. [fols. 378-380] The trustee now holds in trust 24 per cent of the stock of RKO Theatres Corporation. Howard Hughes has filed an election with this Court to remain with the picture company. He is not only the controlling stockholder in that company, to wit, a holder of 24 per cent, but he has also been quite active in the management of the picture company.

We feel that there cannot be any actual divorcement of the RKO group as long as the dominating stockholder and dominating figure in the RKO group is permitted to hold the controlling interest in both the New Theatre Company and the picture company.

[fols. 381-385] First, it is said that the New Theatre stock has not been in existence except since January 1, 1951.

Now, with respect to that contention I would call your Honors' attention to the statement made in support of this reply in which it is said that since the entry of the consent decree there have been several negotiations for the purchase of the New Theatre Company stock by Howard R. Hughes upon a when issued basis. And it is well known in the trade, and it is known to me, your Honors, that there have been a number of negotiations for this stock long before there was an actual divorcement on the part of RKO.

[fol. 386] Mr. Marcus: And they are the second one to have reorganized, that is correct.

Well, I just would like to end my argument by repeating that basically the problem here is whether or not the dominant person in the picture company should be allowed to retain the dominant interest in the theatre company. And because we believe that that would be directly contrary to the principle of divorcement over which there has been so much controversy and as to which this case has become an important case in the annals of antitrust litigation, that that principle would be defeated by permitting this stock to be retained by the trustee without an obligation for that stock to be disposed of.

Mr. Slack: May it please the Court, I do not feel quite sure that the Court has gotten the correct impression of the over-all picture.

Mr. Hughes did purchase a block of stock in RKO in [fols. 387-389] 1947 while these antitrust proceedings were pending.

After he purchased that stock RKO was the first one of the defendants to become a party to serious negotiations with the Government for the settlement of the antitrust suit in so far as it, RKO, was concerned.

[fol. 390] I think it does not need argument for the Court to perceive instantly that the purpose of that clause was

to avoid writing into the consent decree a complete voting trust agreement; that it could not reasonably have been intended upon the face of the agreement——

Judge Coxe: Well, it did contemplate that Mr. Hughes [fol. 391] was going to sell his stock. That language, as I read it, certainly makes that fairly clear:

> "Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate."

Mr. Slack: But he had limits upon it, your Honor.

Judge Coxe: That is true. But it was contemplated, I think, at the time.

Mr. Slack: Yes, and here is how it was contemplated: To be specific, the Government's position was this: We believed that when he loses the voting rights incident to the stock that that will certainly be sufficient incentive, in fact, an impellant that he will surely sell that stock sooner or later; because it was normal and logical for the Government to feel that it needed or at least it was willing to settle this case at that time to serve its own purposes and to break the ranks, so to speak, in this litigation. It was willing to settle that case with only this inducement upon [fols. 392-393] Hughes to sell his stock without stating any specific time within which he might have to do so. And the omission from this agreement from any provision whatsoever which indicated a time limit upon that evidences what unquestionably was the fact, that no time limit was intended at the time.

Judge Hand: Well, supposing he likes it so well that he makes no effort to sell it at all, then what?

[fol. 394] Mr. Slack: The fact is that Mr. Hughes has been trying to sell it, and I have no doubt that he will continue to try to sell it, because I cannot imagine anyone wanting to keep a substantial block of stock of that kind and being deprived of its voting rights. I know that he does not.

[fols 395-397]. But there has been a very upsetting condition here, if I may say so, that since the time of this reorganization proceeding there have been efforts to sell this stock. I am surprised that Mr. Marcus has stated to the Court that he has known of them, and I don't know why he might not have known of them, but as long as a sale of this stock had to be made upon a when issued basis, it being a present subsidiary of the parent which owned 100 per cent of this stock, I am sure this Court can imagine the practical difficulties that would arise in the guarantees that a purchaser would insist upon in the interim period between the time of purchasing the block upon a basis that it could only come into possession of it at a future date and the present time when it might make a purchase. [fol 397a] Now, I cannot conceive in a situation of this kind where the Hughes influence here—and it is a fact, and there have been several statements which are not strictly on the record, and this is one—but it is a fact that when Hughes bought into RKO—and I think Mr. Marcus will admit that it is, that he knows it of record—that it was his influence that caused RKO to go down and enter into this agreement with the Government and agree to [fol. 398] settle this litigation. It was the influence that came to bear upon the new stock control that enabled the Government to do this very thing in the first place. [fol. 399] But even though we should admit that it lies within the power of the court to entertain a motion which is, in effect, coming in and saying, "We now want a new remedy for what we claim as a right although we admit that such right has never been adjudicate"—that seems to me to be the position of the Government here, that by motion without adjudication, without judicial determination of any fact "We now ask for a new and added remedy of a most severe nature."

Judge Hand: Of course, you have got to remember that we made all those decisions upon the theory that we had some conspiring companies against us to violate the Sherman Antitrust Act, and we did not pay any attention to who held five shares, who held 25 shares, who held 500 shares. Mr. Hughes was perhaps not a party but he was a victim. He may have been in the company. As a matter of fact, I do not say that he was or he was not——

Mr. Slack: He was not at the time, no, sir——

Judge Hand: I do not think there is any difficulty about jurisdiction. I think it is a question of what I should [fol. 400] hold is fair to him.

Mr. Slack: Well, on the matter of what is fair to him, it seems to me that it is fair, one, that since he or his influence was certainly a moving cause in coming in and settling all of this with the Government, it seems to me to be fair to him that the Government should live up to this agreement with him here.

Judge Hand: Well, you are claiming the most extreme interpretation of that agreement, which really is that he does not have to do anything ever.

Mr. Slack: I think that is what it says.

Judge Hand: That he does not have to do anything ever; that he can say, "Well, I like this stock; it is good enough for me; I can't vote it, to be sure, but that is good enough for me. It is a very pleasant situation I am in, and I am getting the income from it"—whether it is good or bad, I don't know—"And I am going to stick to that."

There is certainly a remedy against that.

Mr. Slack: Suppose the Government had specifically written that into this consent decree that he could do just that, could there be any question now that the Court would, on motion, without hearing any of the facts, without hearing any of the equities of the situation, upon a motion supported only by an affidavit, and without knowing all [fol. 401] of the facts and the background, would set itself to the task of altering the decree and the agreement that was entered by the parties?

Judge Hand: Well, we will hear what Mr. Marcus has to say to that.

Mr. Slack: Well, I would like to say only this again, that on the basis of what is fair otherwise, I say that since this thing—that seemed at the time to be the right thing to do, to get into and enter into something and bring this thing in and get it settled upon a basis agreeable to the parties—that since that day this stock has been a cloud in the form of a so-called necessity for a forced sale; and to come in here and ask now to immediately have it adjudicated that it is, in fact, going under such a cloud again, and that is why I say that, in any event, why should this motion have

been filed now when the event that would make it necessary or the lack of event which would make it necessary at all could not possibly be determined short of 10 months from now? The only plausible possible result is that again the stock would be under a cloud, and I think that the motion does not have the semblance of fairness and justice that should appeal to this Court in its discussion on the matter, and we should certainly like for the motion in its present form to be denied; and, certainly, if the Court should enter-
[fol. 402] tain the motion at all, we would like for us to have better than a 10-month's shot at this thing in order to get rid of it. Rome was not built in a day, and these companies went on for years; and to take the man who came in and did more than anyone else to start a transformation of the thing and to have it boomerang in his face and to create a terrific difficulty, does not appeal to me, as being fair to him or to the other stockholders of the company.

Mr. Marcus: I should like first to advert to this question of the argument that it is necessary to get the facts and this argument about equities. I think it is apparent, your Honors, for the presence of this section in the decree that we certainly thought that this interest held by Hughes was the controlling interest, and I just do not understand how the argument can be made that at this time we should go into a trial of the issue of whether or not this represents a controlling interest. I am afraid if there was a trial I would have to be called as a witness because I have had dealings with RKO, and those dealings have revealed to me certain that Howard Hughes does control the Picture Company.

Secondly, the point is made that Howard Hughes would suffer some unknown harm if there was a requirement [fol. 403] that this stock be sold. Now, I think Mr. Slack himself has admitted there have been a number of people interested in trying to acquire this stock; there are people who are interested in trying to acquire this stock and there will be people who are interested in trying to acquire this stock; and the stock does not have to be sold within 10 months. If Howard Hughes does not dispose of it by the end of this year then the trustee has two years within which to sell the stock.

Then the question has arisen, why do we make this motion now?

I should like to go into the background a bit on how this motion came about; Mr. Slack came down to us to discuss the matter of presenting a plan to the Court with respect to trusteeing the stock of Howard Hughes, and we discussed the matter back and forth, and the one thing we did not agree upon was that the requirement—we felt there should be in that order a requirement that Howard Hughes would dispose of the stock, and if he does not dispose of it within a reasonable time a trustee be required to dispose of the stock, and that is why this motion is being made at this time.

We told him that we were very reluctant to enter into a stipulation with him so that the order could be entered [fol. 404] prior to the end of last year which was the due date or the expiration date when he would have to trustee the stock because we wanted to have this issue of whether the trustee should be required to dispose of the stock decided at the same time. But we were informed that because of the shortness of time and the appointment of a trustee—and we were willing to go along, but I do not think we should now be questioned with respect to why we bring this motion at this time.

We bring it now because this is the earliest date we could bring it after the entry of the order providing for the appointment of a trustee.

Judge Hand: When was the trustee appointed?

Mr. Marcus: On December 28.

Judge Hand: Of course, you have entered an order which in its terms does not provide for any of these things.

Mr. Marcus: That is right, and that is why it was stipulated——

Judge Hand: Any why you did that, I don't know. You probably could not get any better terms or you could not agree upon anything else.

Mr. Marcus: Well, your Honor, we were not interested in presenting a trust agreement at that time. Mr. Slack was interested, and in order to accommodate him we en- [fol. 405] tered into that stipulation, but we took care to make it clear at that time—and that is why you have that

rather strange paragraph in that stipulation which says that the Government will move—and that is in the very stipulation——

Judge Hand: W-ere is the paragraph?

Mr. Slack: I would say that the Government should not be prejudiced by the agreement on the appointment of a trustee because they did say that they were going to file such a motion, and while I took the same position with them then as I do now——

Judge Hand: Where is that, Mr. Marcus?

Mr. Marcus: This is paragraph 7 of the stipulation which they sign:

> "It is understood by the parties that the plaintiff will move this Court by formal motion returnable during the month of January for an order providing that the terms of this trusteeship shall include a provision empowering and requiring the trustees, if Howard R. Hughes shall not have disposed of it, to sell the stock entrusted to him under terms and conditions to be established by this Court, at any time after one year from the date of entry of an order upon the Government's motion."

Judge Hand: Who signed that stipulation?

[fol. 406] Mr. Marcus: It is signed by us and Mr. Slack as attorney for Howard R. Hughes.

And the last sentence says that "Howard R. Hughes will contest such motion."

Judge Goddard: What?

Mr. Marcus: "Howard R. Hughes will contest such motion."

Judge Goddard: Contest?

Mr. Marcus: Yes. Both parties were anxious to accommodate one another without prejudicing either's rights, and that is why it was entered in that fashion.

Judge Hand: Read that again, what they stipulated to.

Mr. Marcus: "'It is understood by the parties that the plaintiff will move this Court by formal motion returnable during the month of January for an order providing that the terms of this trusteeship shall include a provision empowering and requiring the trustee, if Howard R.

Hughes shall not have disposed of it, to sell the stock entrusted to him under terms and conditions to be established by this Court, at any time after one year from the date of entry of an order upon the Government's motion. Howard R. Hughes will contest such motion."

Now, in the order we have proposed we do not ask that the trustee be required to dispose of the stock at any time [fol. 407] after one year. We have a two year provision, and the net result is that from the date of the entry of the Court's order on this stipulation there will be three years within which the stock should be disposed of.

Judge Hand: And that gave him how much, one year?

Mr. Marcus: One year himself. And if he did not dispose of it within one year then the trustee would dispose of it within two years.

Judge Hand: The trustee had not then been appointed?

Mr. Marcus: At the time of the signing of the stipulation a trustee had not been appointed. A trustee had been suggested to us by Mr. Slack, and we were agreeable, and in this stipulation it is provided that the parties suggest that the Irving Trust Company be named as the trustee; and when your Honors signed the order upon the stipulation, in the very order you appointed the Irving Trust Company as trustee.

Judge Hand: What is the order that you have talked about before that we signed?

Mr. Marcus: That is that order.

Judge Hand: That is that order?

Mr. Marcus: That is that order, yes, your Honor.

At the bottom of this stipulation this is what appears:

> [fol. 408] "So ordered as to Paragraphs 3, 4, 5, 6 and 7. The Irving Trust Company is hereby appointed trustee, as suggested in Par. 1 of the above stipulation."

Paragraph 7 is the one I just read.

Judge Coxe: It really means three years for Mr. Hughes, because if he should not do anything within one year he certainly would be available for the purpose of finding and proposing and negotiating a sale which would be formally consummated by the trust company.

Mr. Marcus: That is right.

Judge Coxe: So it is really three years that he has.

Judge Hand: They claim this puts a cloud over their efforts.

Mr. Marcus: Well, your Honor, all I can say about that is that I am not prepared to say that there would not be some cloud. There is that kind of cloud in any judgment that is entered which requires the disposition of stock. There is that cloud in the Paramount judgment; there is that cloud in the Warner judgment; there is that cloud in the Crescent Amusement Company judgment; there is that cloud in the Aluminum judgment. But we tried to alleviate the effects of that cloud by providing for a reasonable time within which that stock should be disposed of, [fol. 409] and that is what we are attempting to do here.

Judge Hand: Now, Mr. Slack wants more time. That is what he really wants, I guess.

What have you got to say to that?

Mr. Slack: If I am otherwise wrong in my feelings about the matter, your Honor, why, I would want more time. I think that it is a very pertinent question, since the Court will always have such a jurisdiction as it now has over this matter; why must it announce to the public now what its decision on such a motion as this might be? That is why I should think it is prematurely brought, and that it is something for which there is no present need, particularly in the light of the admissions of Mr. Marcus that he personally knows of the negotiations that have been going on to try to make a sale of this. It is worth, it seems to me, a very considerable sum of money to any purchaser in a competitive market to have the Court say, even though the Court said we will not now require it within one year, to even say it in two. But, of course, if that is the best we can have we would much prefer to be able to do our own negotiations for a longer period than the slightly over 10 months that would remain here, because there is no guarantee—we have no power over the trustee in this proposed order.

Judge Hand: When does your time expire under their [fol. 410] proposition?

Mr. Slack: At the end of this year, about ten and a half

months from now. We would be, at the end of this rather ungratious allowance, as I see it, at the end of ten and a half months we might wake up the next morning and find that the trustee had sold the stock. As your Honor says, maybe the trustee would take two years; maybe the trustee would take two days; there is no way for us to know. And, of course, that points up there what I think is a rather unorthodox provision here, and I should like to digress——

Judge Hand: Of course, you are not just babes in the woods here. You bought into this proposition, and if you had been anybody else—you were relying on the fact that the consent decree did not say anything about this particular thing, but you bought into this, and if you had been anybody else they would have paid no attention whatever to your claims or rights. The RKO would have been deprived of its theatres under our decision——

Mr. Slack: That is correct.

Judge Hand: You might or might — have been touched. You took that chance when you bought in. We paid no attention to stockholders, as you know, or creditors or anybody else. It is a tough business, this Sherman Anti-[fol. 411] trust Act.

Mr. Slack: In the Paramount case, if I may say so, the stockholders approved a plan of reorganization which expressly provided for the trustees power of sale, and the Court merely sanctioned there the consent decree, but the power of sale on the part of the trustee in these other cases is derived by direct consent of the parties involved, affirmative, unequivocal consent of the parties involved. And this matter is completely unprecedented. If this trustee is put in the position of, in effect, being required to make a forced sale of the man's property who has never agreed to it and against whom no fact has ever been adjudicated, could require him to give it up—and such does not exist in any of these other cases, not one; there is no precedent for this in any of these other moving picture cases. But to the Court's question, if the Court's ruling is to be that it would enter such an order, then, of course, we would like to have a longer period, because we think the time during which we can make our own efforts is unjustifiably short. This is a big property, and we are talking about a $5,000,000 property, and, as the Court knows, those things

do not move like a basket of eggs. It is difficult. It is something that is very difficult to get the value out of. Ten [fol. 412] and a half months is a very short space of time.

Judge Hand: Let me see. How long have you had since this reorganization was set up?

Mr. Slack: Since the reorganization was first proposed, November 8, 1948, that has been two years. But there again, as Mr. Marcus knows, when you would have a purchaser or a proposed purchaser to come up, you would have all kinds of questions that would enter into it that are so difficult to provide against. As, for instance, I can cite a specific *a* case. Here is Mr. Harry Brand of New York, and who Mr. Marcus knows and who has talked to him, he was proposing to purchase this upon a when issued basis. The big stumbling block that came in was this: We would say to Mr. Brand, "When the time comes for you to take this—you can't take it now; we have nothing to deliver to anyone"—could not have until the reorganization was accomplished—we said to Mr. Brand, "Well now, if we make this sale to you do you guarantee that the acquisition of this by you will not in itself be a violation of the antitrust laws? And what do you propose to do if it should be and if you should turn up on the closing date, which can only be in January of 1941, if you should awaken and find this whole transaction enjoined?"

Well, we do not think it is in violation of it, but we could [fol. 413] not sit on the barrel.

Judge Coxe: That is all ancient history now, isn't it?

Mr. Slack: That is all ancient history, yes.

Judge Coxe: You won't have those difficulties from now on.

Mr. Slack: That is correct, sir. But we have had them, a world without end during this period and it could only be negotiated for or bargained for or traded upon the basis of its present non-existence. It has been a most difficult thing.

Judge Hand: Mr. Marcus, what do you say to giving him two years for himself and two years to the trustee?

Mr. Marcus: That would be satisfactory.

Judge Hand: Well, that is what we will do. You can propose an order.

Mr. Slack: Two years and two?

Judge Hand: Yes. That gives you a good deal more time, and I think the thing has been so unsettled that you are entitled to some more time.

Judge Coxe: Will Mr. Hughes consent to it, so you won't have to argue all over again this question of jurisdiction?

Mr. Slack: Do I understand that the Court wants me to [fol. 414] agree to be bound by the Court's judgment?

Judge Coxe: No, I was just asking you if you were willing to be bound, not as a condition of this extension, but whether you would. It seems to me you would get along better with the Government if you did.

Mr. Slack: Is it the Court's question as to whether or not I would be willing to waive any error that might exist in the Court's order if it provides for the two years?

Judge Hand: Yes.

Mr. Slack: That is a matter that I would like, with the consent of the Court, to consult with my client on before assuming the responsibility of binding him.

Judge Hand: I think that is all. I think you should get it, though.

Mr. Slack: And do I understand correctly that it is the feeling of the Court that it would make it two years only in the event that Mr. Hughes would consent to that order?

Judge Hand: I think so.

Judge Coxe: I do not think there is anything in the point of jurisdiction myself.

Judge Hand: Neither do I.

Mr. Slack: Your Honor, I will undertake that now—— [fol. 415] Judge Hand: I do not ask an attorney to foreclose his client if he has not consulted with him and he thinks the thing is important. If you want us to do it we can put this thing over maybe for a week, and you can then report.

Are you living here?

Mr. Slack: No, sir, I live in California; I am here just for this.

Judge Hand: I see. Well, would you be prepared to telephone him and let us know then?

Mr. Slack: If I might suggest it, your Honor, I could enter his consent as a part of the decree that would be sub-

mitted and this would indicate to the Court his consent, if that would be agreeable.

Judge Hand: I should think so.

Now, are you prepared to fix up the order without more suffering about resettlements and so on?

Mr. Marcus: Yes. We did very much the same thing last year when RKO had a motion and we had a counter-motion with respect to stock in the Metropolitan Playhouses, Inc. When we finished the argument counsel got together and we submit a joint order, and I suppose if Mr. Hughes is willing to consent, that is what we will do here.

Mr. Slack: I will work towards that end. If I could procure his consent we will work towards the end of a [fol. 416] joint order.

I feel, in justice to the Court, Mr. Marcus, that I should point out that this order is inconsistent upon its face with the accepted theory that Mr. Hughes could still sell the other stock. On the Government's order as submitted the trustee would still have to sell the Theatre Company even though Hughes sold the other.

Mr. Marcus: As to that, that is a little bit ridiculous, your Honor, if I might say so. In the first place, Mr. Hughes has submitted to this Court an election to remain with the Picture Company. Secondly, I have no doubt if he changes his mind he will come in and ask for an amendment, and I have no doubt also that as far as we are concerned we just want him to remain with one company. If he wants to remain with the Theatre Company, that is all right.

Mr. Slack: The consent decree expressly provides, I believe, that the trust would have to terminate upon the sale of either stock even though it would be the stock that is not trusteed, if I am not mistaken, and this order does not recognize that fact.

Judge Hand: Well, do you think you are ready to put this thing through?

Mr. Slack: Yes.

Judge Hand: If he does not agree to this I think we [fol. 417] better adjourn this hearing and make our own order.

I understand you are going to recommend this?

Mr. Slack: To recommend this?

Judge Hand: To Mr. Hughes.

Mr. Slack: With perfect candor to the Court, I feel at the moment that I will, but I want to think about it, if I may, myself.

Judge Hand: All right.

Mr. Slack: And I do not want to bind myself to recommend it, although I think I shall.

Judge Hand: Perhaps we had better adjourn it for a week.

Mr. Slack: All right, sir. I think I shall stay here in New York until the matter is concluded.

Judge Goddard: How much time do you think you will need?

Mr. Slack: I think I can do it within the week that you mentioned.

Judge Goddard: Next Thursday is the 22nd. Can you do it before that?

Mr. Slack: I think so, yes, sir.

[fols. 418-419] Judge Hand: You mean you think you can have it by the 21st?

Mr. Slack: Wednesday?

Judge Hand: Yes.

Mr. Slack: Yes, sir.

Judge Hand: All right.

Mr. Slack: That is, I will have the decision one way or the other.

Judge Hand: Then we will adjourn it until Wednesday in this same room at 4.00.

(Adjourned to Wednesday, February 21, 1951, at 4.00 p. m.)

[fols. 420-421] IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF ORAL HEARING

Before: Hon. Augustus N. Hand, C. J., Hon. Henry W. Goddard, D. J., and Hon. Alfred C. Coxe, D. J.

New York, February 21, 1951;
4:00 o'clock p. m.

[fols. 421a-422] Mr. Slack: What I was going to say is I do not think I was correct in my analysis of this thing as being a problem of jurisdiction as I argued, and I wish therefore to get off of that track and get down to what I believe are the two fundamental problems involved:

One, is this an order—this requested order—is it a request or a motion to modify the terms of the consent decree?

Number two, if it is such a motion then is the procedure here adopted a proper one, and has this Court been furnished with the background of facts or evidence, or, in short, proof such as is required in order to cause this Court to modify a consent decree over which it retained continuing jurisdiction?

[fol. 423] Judge Hand: What about the provision in subdivision 8 about the retention of jurisdiction for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such orders or direction as may be necessary and appropriate for the construction, modification or carrying out of the same for the enforcement or compliance therewith, and for the punishment of violations thereof, or for other or further relief?

[fol. 424] Mr. Slack: I think that is perfectly good, your Honor, a perfectly good provision.

Judge Hand: All right.

Mr. Slack: But that in no way conflicts with what I say, as I see it.

Judge Hand: I don't know whether it does or not.

Mr. Slack: I think it does not for this reason, your Honor. The Court does have continuing jurisdiction.

Judge Hand: Here is something which you are asking to have perpetuated. That is what you are really asking for. You say "I will sell this stock not within what I might

describe roughly as a reasonable time, but I will sell it when I please, when it seems to be expedient. Although you have said nothing about when I should sell it, you merely set up this provision about the trust, and you are without power under this or any other provision unless you try the whole matter all over again."

Mr. Slack: No, sir, I do not mean that, your Honor. That is why I was so anxious to not again be guilty of misusing these terms that would confuse this Court's power over the subject matter with this Court's duty to see that a remedy is not afforded to anyone except following the correct procedure and the correct method of bringing before this Court the facts.

[fols. 425-429] We can't try facts in this proceeding. This is nothing but a motion by the Government. If the Government wishes to try the issue as to whether this consent decree was ambiguous, why, I think upon a proper petition to that effect they may certainly invoke the jurisdiction of the Court to do so. I think that when I suggested the other way——

Judge Hand: If it is not ambiguous it is surprising that anybody should consciously make such a decree that the respondent here could always keep in statu- quo——

Mr. Slack: We had no objection to the respondent keeping it in statu- quo. We feel perfectly confident that the agreement of the parties is very clearly set forth. We have no fear of anything that the respondent might bring before this Court or any other Court as long as they show all of the facts.

[fol. 430] Judge Goddard: Mr. Slack, what does your client intend to do, to keep this stock or to sell it when he can find a reasonable offer?

[fols. 431-432] Mr. Slack: If the Court please, I think that it is not out of line for me to say to the Court that not only does he intend to sell it but he has sought a market. In the absence of anything in this Court's decree that will again throw a cloud over it——

Judge Goddard: This gives him four years.

Mr. Slack: Sir?

Judge Goddard: This gives him four years.

Mr. Slack: This gives him four years with a cloud hanging over it that if he does not sell it by that time then

somebody is going to sell it for him. I would prefer to say to the Court, to keep the discussion and the argument on a proper track, that I think he intends to sell it; I know he does because I have been tied up with very sincere and earnest negotiations to that effect; but I would prefer to say to the Court that I am standing on the proposition that he does not have to. I think there is every reason in the world why he should, and I think he would be very foolish not to, but I do not think that he has to.

Judge Goddard: Don't you see if he is allowed to keep the stock he is doing just what we intended to prevent; he is enjoying the profits of the two corporations.

[fol. 433] Judge Hand: When did you set up your voting trust?

Mr. Slack: On this Court's order on December 28 last, a month and a half ago. And that was a voting trust as provided in the consent decree.

Your Honor said a while ago I am seeking to perpetuate something. I am not asking to perpetuate anything, your Honor. I am just asking to be let alone.

Judge Hand: I know, that is the way you phrase it.

Mr. Slack: Your Honor, I am not asking to perpetuate anything that was not perpetual by its own terms, in which [fol. 434] the Department of Justice certainly did agree to, which was a part of their bargain.

Judge Hand: That at least is a better way of putting it.

Mr. Slack: And I say I want to clarify this argument by saying that if the Attorney General comes in here on a proper proceeding and says, "We want to show the Court that what we agreed to when this thing was entered is something that this Court should change because of the facts," then I would say certainly this Court should heard the facts, and after hearing the facts should determine what should be done. But here the Department of Justice——

Judge Coxe: What facts are you talking about?

Mr. Slack: What facts I am talking about?

Judge Coxe: Yes.

Mr. Slack: I do not think there are any, your Honor. I do not think there are any that can be presented to show this Court that the Department of Justice is in any different position today than it was when it agreed that Mr.

Hughes's stock never had to be sold. And it surely did agree to just that. And I do not think it is in any different situation today. If they think they are, then this Court should open its doors to them and say, "Come in and show us"; comply with the rule that your Honor himself has [fols. 435-439] stated, that it takes a showing of changed conditions.

[fol. 440] Judge Coxe: Well, he could have put in the voting trust the term of two years, that if the stock was still there in the voting trust, that it should be disposed of. Couldn't that be done?

Mr. Slack: Could that be done?

[fol. 441] Judge Coxe: Yes.

Mr. Slack: I doubt very much that it could be done and have a lawyer in a contract refer to it only as a voting trust. If it were done the reference to it as a voting trust would certainly be erroneous; it would be a general trust.

Judge Coxe: They do not have to be stereotyped things that mean nothing at all except just voting.

Mr. Slack: I quite agree with you.

Judge Coxe: When we were here before I think you stated that it was contemplated at the time of the negotiation when the agreement was signed that the stock would be sold.

Mr. Slack: If I said something like that, your Honor, that was never intended. Nothing has ever come to me with a greater shock than the suggestion that this stock might be forced under the hammer into a sale. I assure you it was never contemplated. And if the record of this proceeding is brought in a fashion that forms part of the record, the record will prove conclusively that not only did we not intend it, but neither did the Government; and I would be most happy to set this thing out in written form where the authorities are clearly outlined. I should like the opportunity to do so if there is any doubt about it. [fols. 442-454] I do not think I intended to say, your Honor, that it was contemplated——

Judge Coxe: Well, when I used the word "contemplated"——

Mr. Slack: If I gave that impression I certainly did give an erroneous one, because nothing could have been further from the contemplation of the parties. Naturally,

since the question was raised, the Government asked us to do it, and it was expressly denied, and agreed to.

[fol. 455] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 14, 1951

Appellant adopts for his statement of points upon which he intends to rely in his appeal to this Court, the points contained in his Assignments of Errors heretofore filed.

Appellant designates the following portions of the record to be printed on this appeal.

1. Amended and supplemental complaint filed November 14, 1940.

2. Consolidated answer of Radio-Keith-Orpheum Corporation, et al. to amended and supplemental complaint filed November 14, 1940.

3. Answer of Keith-Albee-Orpheum Corporation to amended and supplemental complaint filed November 14, 1940.

4. Consent decree—Rules of Arbitration and Appeals—filed November 20, 1940.

[fol. 456] 5. Application for modification of consent decree filed August 7, 1944.

6. Findings of Fact and Conclusions of Law, Decree of Expediting Court, December 31, 1946.

7. Mandate of Supreme Court.

8. Radio-Keith-Orpheum Corporation consent decree of November 8, 1948.

9. Order amending Radio-Keith Orpheum Corporation decree dated January 20, 1949.

10. Order amending Radio-Keith-Orpheum Corporation decree dated October 10, 1949.

11. Order amending Radio-Keith-Orpheum Corporation decree dated November 18, 1949.

12. Order amending Radio-Keith-Orpheum Corporation decree dated April 13, 1950.

13. Order amending Radio-Keith-Orpheum Corporation decree dated April 24, 1950.

14. Order of severance dated January 18, 1950.

15. Order appointing trustee for Howard R. Hughes' stock filed December 28, 1950.

16. Motion filed by the Government for order to compel sale of Mr. Hughes' stock together with supporting affidavits, dated January 11, 1951.

17. Answers and supporting affidavit of T. A. Slack to motion and affidavits of Government dated February 9, 1951 and February 21, 1951.

18. Order granting the motion of Government dated March 24, 1951.

19. Petition of Howard R. Hughes for Appeal.

20. Order Allowing Appeal.

21. Citation on Appeal.

22. Assignment of Errors and Prayer for Reversal.

23. Statement of Jurisdiction of the Supreme Court of the United States.

24. Statement of Defendants-appellants Directing Attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.

[fols. 457-458] 25. Certificate of Service of Notice of Appeal.

26. This Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed.

T. A. Slack, Attorney for Appellant, Howard R. Hughes, 7000 Romaine Street, Hollywood 38, California.

Acknowledgment of service (omitted in printing).

[fols. 459-462] Appellee's Designation of Additional Parts of the Record to be Printed—Omitted in Printing

[fol. 463] IN THE SUPREME COURT OF THE UNITED STATES

No. 86, October Term, 1951

[Title omitted]

ORDER—October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Clark took no part in the consideration or decision of this question.

[fol. 464] IN SUPREME COURT OF THE UNITED STATES

Order—November 13, 1951

The motion of appellant to strike certain items from appellee's designation of parts of the record to be printed is granted except as to the excerpts from the transcripts of oral argument specified by appellee in its opposition to appellant's motion. Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of this motion.

[fol. 465] IN SUPREME COURT OF THE UNITED STATES

EXCERPTS FROM TRANSCRIPTS WHICH GOVERNMENT DESIGNATES FOR PRINTING

Transcript of April 19, 1950:

P. 7. "Appearances:"

P. 8. "Thomas A. Slack, Esq., (of the Texas Bar), Attorney for Howard R. Hughes."

P. 11, l. 13: Beginning with the words [Mr. Donovan] "Now I come," and ending p. 12, l. 18, with the words "confiscatory penalties."

P. 21, l. 16: Beginning with the words [Mr. Marcus] "The answer is no." and ending, p. 27a, l. 7, with the words [Mr. Kern] "the reorganization."

P. 43, l. 19: Beginning with the words [Mr. Marcus] "That is right." and ending, p. 45, l. 14, with the words "own theatres."

P. 50, l. 7: Beginning with the words [Mr. Marcus] "With a great many" and ending, p. 51, l. 18, with the words "stock interest."

Transcript of February 15, 1951:

P. 3, l. 20: Beginning with the words [Mr. Marcus] "Now, the reason" and ending, p. 4, l. 12, with the words "picture company."

P. 7, l. 7: Beginning with the words [Mr. Marcus] "First, it is" and ending, p. 7, l. 18, with the words "RKO."

P. 12, l. 8: Beginning with the words "Mr. Marcus: And they are" and ending, p. 13, l. 6, with the words "was concerned."

P. 16, l. 20: Beginning with the words [Mr. Slack] "I think it" and ending, p. 18, l. 8, with the words "then what?".

P. 20, l. 20: Beginning with the words [Mr. Slack] "the fact" and ending, p. 21, l. 16, with the words "a purchase."

P. 24, l. 18: Beginning with the words [Mr. Slack] "Now, I cannot" and ending, p. 25, l. 4, with the words "first place."

P. 26, l. 5: Beginning with the words "But even though" and ending on bottom of p. 45.

Transcript of February 21, 1951:

P. 48, l. 4: Beginning with the words [Mr. Slack] "What I was going" and ending, l. 17, with the words "continuing jurisdiction?".

P. 59, l. 17: Beginning with the words [Judge Hand] "What about the" and ending, p. 61, l. 17, with the words [Mr. Slack] "of the facts."

P. 66, l. 23: Beginning with the words [Judge Goddard] "Mr. Slack, what does" and ending, p. 67, l. 24, with the words "two corporations."

P. 69, l. 14: Beginning with the words [Judge Hand] "When did you" and ending, p. 71, l. 2, with the words [Mr. Slack] "changed conditions."

P. 76, l. 21: Beginning with the words [Judge Coxe] "Well, he could have" and ending, p. 78, l. 9, with the words [Mr. Slack] "and greed to."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1950~~ 51

No. ~~773~~ 86

HOWARD HUGHES,

Appellant,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

T. A. Slack,
Leonard P. Moore,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 773

HOWARD HUGHES,

Appellant,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended appellant, Howard R. Hughes, submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause:

Opinion Below

The final judgment appealed from was entered without opinion by the District Court for the Southern District of

New York, composed of three judges. Attached hereto as Appendix A and in the order named are:

1. Section V of the Consent Decree of November 8, 1948, being the entire agreement of Hughes and the portion of the decree material.
2. The Stipulation of the parties filed December 28, 1950 which was adopted as the order of the Court appointing the trustee to hold the Hughes stock here involved.
3. The Motion of the Attorney General of the United States dated January 11, 1951 to require the trustee to sell the Hughes stock.
4. The replies of Howard R. Hughes to such motion of the Government, dated February 9, 1951 and February 21, 1951.
5. A copy of the Court's final judgment dated March 24, 1951 ordering the trustee to dispose of the Hughes stock and from which this appeal is taken.

Jurisdiction

The final judgment of the District Court requiring the voting trustee to dispose of the Hughes stock (called an "Order") was entered on March 24, 1951. The jurisdiction of the Supreme Court to review this decree by direct appeal is conferred by Title 15 United States Code Section 29 and by Title 28 United States Code Section 1253.

This is a suit in equity brought in the District Court of the United States wherein the United States is complainant and it was brought under the Sherman Anti-Trust Act. That the "Order" appealed from is in fact a "final judgment" and therefore that the Supreme Court has jurisdiction to review such judgment on direct appeal in this case is supported by the following authorities among others:

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120; 89 L. Ed. 2092;

Chrysler Corporation v. *United States*, 316 U.S. 556; 86 L. Ed. 1658.

That the jurisdiction of the Supreme Court to review the judgment on direct appeal exists also by virtue of Section 1253 of Title 28 U.S.C. is apparent although such section has yet to be construed in a similar case.

Question Presented

Howard R. Hughes, not theretofore a party to a civil anti-trust suit against a corporate defendant, voluntarily entered his consent to a decree which required him to deposit in a voting trust certain stock of a corporation to be acquired by him. The consent decree specifically provided that the voting trust should "remain in force until *Howard R. Hughes* shall have sold his holdings * * *". After enumerating certain other specific characteristics and having so specified the duration of the prospective voting trust the consent decree then provided that the trust should be upon "such *other* terms or conditions. * * * as shall be prescribed by the Court". The question presented is whether the District Court, upon simple motion of the Government and without hearing competent evidence of any kind and in the absence of any previous findings of facts relating to the right of Howard R. Hughes to continue to own such stock, may in effect decree the confiscation of the stock by an "Order" to the Court's trustee to dispose of it.

Statutes Involved

The action was filed under the Sherman Anti-Trust Act (15 U.S.C. Sections 1, 2, and 4), but appellant was not a party to the action prior to the consent decree nor has there ever been any evidence or adjudication of any violation of the Act on the part of Appellant.

Statement

The order of the District Court here brought into question comes after some years' history of litigation between the United States and various corporations in the motion picture industry, including the defendant in this severed cause, Radio-Keith-Orpheum Corporation and certain of its wholly owned subsidiaries.

The United States alleged many violations of the Sherman Act on the part of the defendants and alleged that integrated ownership of the production end of the motion picture business and the exhibiting end of the business by these corporations constituted a monopoly.

No stockholders of any of the defendant corporations were made parties. There have never been allegations, evidence, or findings of fact which would reach the stockholders of the defendants or would suggest that any individual stockholding constituted a violation of law.

Of the history of the case it is material here only that in 1944 the Attorney General filed a certificate under the Expediting Act and the Three Judge Expediting Court from which this appeal is taken was convened.

Prior to November 8, 1948 the consent decree involved in this appeal was negotiated between the United States and the Radio-Keith-Orpheum Corporation defendants. Under this consent decree certain future practices were permitted and others were enjoined, also a contemplated plan of reorganization of RKO was referred to and the completion of this plan of reorganization was made a condition to the continued force and effect of the consent decree. The reorganization contemplated two new corporations to replace the then single parent corporation and to be owned by the stockholders of the then single parent.

As a part of the agreement of settlement between RKO defendants and the United States, Howard R. Hughes voluntarily became a party to the consent decree for the limited purpose of making certain agreements with respect to certain stock of the two new companies which would be issued to him as a result of the RKO reorganization.

The appearance or consent of Howard R. Hughes, who was theretofore not a party to the proceedings, was in words as follows:

> "I hereby consent to the entry of section V of the above decree:
>
> HOWARD R. HUGHES,
> By RALSTONE R. IRVINE,
> *His Attorney*"

Section V of the consent decree constituted the entire agreement of the parties with respect to the Hughes stock and the only portion of the consent decree which referred to it.

Such section *clearly recognizes the possibility that Hughes might retain his holdings in both of the new companies* created as a result of the reorganization. It then *specifically provides what shall happen in that event*, i. e., he shall "*Deposit* with a trustee * * * all of his shares of the New Picture Company or the New Theatre Company, * * * under a *voting trust* agreement whereby the trustee shall *possess and be entitled to exercise* all the *voting rights* of such shares, including the *right to execute proxies and consents* with respect thereto. Such voting trust agreement shall thereafter *remain in force* until *Howard R. Hughes* shall have sold his holdings * * * of the New Picture Company or the New Theatre Company * * * and upon such sale * * * such voting trust agreement *shall* automatically terminate * * *".

Having set forth clearly the basic purpose, characteristics and duration of the trust, Section V then provides: "Such trust shall be upon such *other* terms or conditions, including compensation to the trustee, as shall be prescribed by the Court". This provision was for the obvious purpose of providing the necessary power to implement the trust *within the framework of its expressed provisions, purposes and limitations.*

That there might be no doubt as to the limitations on the trustee's powers with respect to the stock or the proceeds of any sale *by Hughes,* it was then provided: "During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends * * * on account of the trusteed shares, and proceeds from the sale thereof".

On December 28, 1950 the District Court entered its order (agreed to by the parties) appointing a trustee for the stock of Howard R. Hughes in the New Theatre Company. This order was in strict conformity with the consent decree and contained no provision for sale. In the document constituting such agreement for the appointment of the trustee, the Attorney General stated that he would file a motion to require the sale of this stock and Hughes stated simply that such motion would be opposed.

Upon the entry of the order, Hughes delivered to the trustee nearly one million shares of the capital stock of the New Theatre Company worth, according to the open market quotations of the day, approximately $4,000,000. This stock is still in the possession of the trustee.

Such stock having been delivered to the trustee under the order of the District Court, which in no way violated the terms of the consent decree, the Attorney General filed a motion for an "amendment to the order appointing the trustee" which would direct the trustee, after the passage of two years' time, no longer to hold the stock of Howard

Hughes under the voting trust as provided in the consent decree, but to "dispose of it".

Although this motion by the Attorney General purported to be supported by an affidavit attached, even this incompetent document contained no statement, allegation, or assertion of any changed conditions or any supposed justification for the confiscation sought except that in the "considered opinion" of the particular assistant Attorney General who filed the motion and signed the affidavit the stock of Hughes should be sold by the trustee in order to accomplish complete divorcement of the RKO Picture Company from the RKO Theatre Company. Even the affidavit contained no assertion of fact which was not obviously in the contemplation of the parties as well as the Court at the time of the entry of the consent decree.

Thus, having in good faith entered into an agreement with the representatives of the United States in order to settle litigation to which he was not a party, Howard R. Hughes consented to deprive himself of the voting power which was otherwise incident to his ownership of corporate stock. The parties carefully specified the substance of Hughes' agreement, namely, that if he had not disposed of his stock prior to a certain date he would "Deposit with a trustee * * * all of his shares of the New Picture Company or the New Theatre Company * * * under a voting trust agreement * * * *" which would "*remain in force* until *Howard R. Hughes* shall have sold his holdings * * * *" of one or the other of the companies.

Having thus clearly outlined and defined the basic purpose, characteristics, and duration of the trust, the Hughes agreement and the consent decree then provided that such trust should be "upon such *other* terms or conditions * * * as shall be prescribed by the Court".

Thus, the limitations upon the agreement of the parties with respect to the Hughes stock were carefully prepared with respect to the essential terms and conditions of the trust. In order to give the Court power to implement the agreement as made it was provided that the Court should supply the remaining terms, obviously to accomplish the stated purpose and within the stated limitations.

Having so carefully sought to define his agreement and protect his property rights, Hughes now finds that neither the other party nor apparently the District Court attaches any sanctity whatever to the agreement as made, that it is now treated as a meaningless thing except insofar as it was useful in bringing him within the jurisdiction of the Court, causing him to surrender possession of $4,000,000 worth of his property, and empowering the Court thereafter upon mere motion of the Attorney General to decree the confiscation or forced sale of his property. All of this is notwithstanding the complete absence of any evidence or findings of any kind that his ownership of such stock constituted any violation of law.

The Court's judgment which is here appealed from directs the trustee "that if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20, 1953 the trustee shall dispose of such stock within two years thereafter". Under this decree, Hughes must now either sell his investment—whether he wants to or not—regardless of the market conditions, or suffer it to be sold by the trustee.

The Direct Appeal Lies under Section 29, Title 15, United States Code

No consideration of form nor technicality of procedure should be permitted to disguise or conceal the true nature of the judgment appealed from. It is immaterial that the

immediate "Order" of the Court was in form directed to the Court's trustee. The results here are no different than if the form of the Attorney General's motion had been for an *amendment to the consent decree* so that it would provide for the *sale* of the Hughes stock by the trustee in place of the existing provision that it should be held in a voting trust "until *Howard R. Hughes* shall have sold his holdings".

The unquestionable and unequivocal result of the "Order" is that the consent decree is modified so that in lieu of the limited restrictions upon his rights of ownership as provided in the consent decree Hughes must now dispose of his stock by February 20, 1953 or suffer forced sale thereof.

The "Order" appealed from meets every requirement of a final judgment according to the many analyses and treatments of that term which have been handed down by the Supreme Court. Its effect was to amend the consent decree as was done in *Chrysler Corporation* vs. *United States*, 316 U. S. 556, and in *Ford Motor Company* vs. *United States*, 335 U. S. 303.

It was only upon the entry of this "Order" that for the first time there existed the characteristics referred to by the Supreme Court in *Radio Station WOW, Inc.* vs. *Johnson*, 326 U. S. 120, namely, that Hughes, by decree of the Court, has been required to transfer *possession* of his property to the Court's trustee and the trustee has been *unequivocally ordered to sell it* unless Hughes himself sells it.

In *Republic Natural Gas Co.* vs. *Oklahoma*, 334 U. S. 62, Mr. Justice Frankfurter recognized the instances where the Supreme Court "has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party

would be irreparably injured if review were unavailing" and said "For related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow".

Hughes has no remedy except a direct appeal to this Court. Otherwise he must dispose of some $4,000,000 or more of stock within a period of less than two years, regardless of market conditions and under the disadvantage of a court decree that if he does not sell it, it will go under a forced sale.

No further action is contemplated by the order appealed from except to see that the vendee of such stock would not be placed in violation of the anti-trust laws by its purchase.

The Direct Appeal Lies under Section 1253, Title 28, United States Code

Section 1253 provides for a direct appeal "from an order granting or denying an interlocutory or permanent injunction in any civil action * * * required by any act of Congress to be heard and determined by a District Court of three judges".

In this case a certificate was filed by the Attorney General under the Expediting Act and all proceedings thereafter were required by Section 28 of Title 15, United States Code (the Expediting Act). Not only is the order appealed from in fact a mandatory injunction that the stock shall be sold, but it is an amendment to the consent decree which also enjoins. We believe there are no authorities for or against jurisdiction here under Section 1253 but the language of the section seems clear.

The Questions Are Substantial

Aside from the injury to the individual appellant resulting from the decree of a forced sale of this large property the question here is of great importance.

Obviously, voluntary settlement of litigation should be encouraged and the consent decree should continue to be, as it has been in the past, a means or device to accomplish settlements of large scale disputes.

The proceedings involved in this appeal make it apparent that the present concept of the office of the Attorney General of the United States is that a consent decree over which the court has continuing jurisdiction is something utterly lacking in stability or in the quality of permanently settling any of the issues that existed between the parties. As authority for this shocking concept the Attorney General will, no doubt, cite *Chrysler Corporation* vs. *United States,* 316 U. S. 556.

Although the Assignment of Errors here (to the general effect that the Court has overridden and nullified the clear provisions of the consent decree upon mere unsupported motion of the Attorney General and without according to the aggrieved party the right of a trial to determine the facts) are unquestionably similar to the Assignments in the *Chrysler* case, there is no further similarity between the issues in the two cases.

In the *Chrysler* case the consent decree was amended as to the date upon which it would become ineffective unless General Motors Corporation were, by judgment, also brought under the control of similar restrictions.

The *Chrysler* case is different from the case at bar in that there the Government did introduce *evidence* in the form of a transcript of its proceedings against General Motors to show the facts relating to its efforts touching the condi-

tions of the consent decree. All of the *facts* upon which the determination was made were a matter of record before the Court and there were *findings of fact* and conclusions of law. In the case at bar, there is no competent evidence but merely an affidavit by an Assistant Attorney General containing some statements proved by the record itself to be erroneous and containing no statements which, even if competent as evidence, could form a lawful basis for the judgment appealed from.

We are here confronted with a shocking example of arbitrary action of a type which was thought by Mr. Justice Frankfurter to be the basis for his strong dissent in the *Chrysler* case.

Unquestionably it is and has been the law that a consent decree, though the jurisdiction of the court entering it may continue for certain necessary purposes, nevertheless settles the rights of the parties therein treated except upon a showing of changed conditions which were unforeseen at the time of the decree and which upon hearing make it seem equitable that the original decree should be set aside, modified, or replaced. Such was the clear holding of *United States* v. *Swift and Co.*, 286 U. S. 106, *United States* v. *International Harvester Co.*, 274 U. S. 693, and *Ford Motor Company* v. *United States*, 335 U. S. 303.

Appellant does not contend that a consent decree is any more or less subject to modification by the Court having continuing jurisdiction than is any other decree. He contends merely that in either case a modification thereof to the detriment of any party thereto may be made only upon proper showing and such was not even attempted here.

If the judgment here appealed from can stand, then consent decrees in equity cases involving injunction or, indeed, in any case of continuing jurisdiction, must be meaningless things to which no sane person would become a

party and thereby subject himself to unknown and undefined hazards with no guaranty of the protection of his rights by lawful processes.

Clearly the District Court should not have ordered the sale of the Hughes stock without requiring the United States to show by competent evidence why such a departure from the terms of the consent decree should be had. The sanctity and effect of consent decrees which settle important litigation should, at least to this extent, be clarified on this appeal.

Respectfully submitted,

(S.) T. A. SLACK,
Counsel for Appellant,
Howard R. Hughes;

(S.) LEONARD P. MOORE,
Atty. for Appellant.
25 Broadway,
New York 4, N. Y.

T. A. SLACK,
7000 Romaine Street,
Hollywood 38, California.

APPENDIX "A-1"

Excerpt from Consent Decree

V

Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of eighteen months* from the date hereof, Howard R. Hughes shall either:

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of Section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees.

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* "eighteen months" added and "one year" deleted by order dated October 10, 1949.

APPENDIX "A-2"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87273

UNITED STATES OF AMERICA, *Plaintiff*,

against

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

STIPULATION

It is hereby stipulated and agreed between the plaintiff and Howard R. Hughes that pursuant to Section V of the consent judgment entered in this cause on November 8, 1948, as amended:

1. The name of Irving Trust Company located at 1 Wall Street, New York, New York is hereby suggested to this Court as trustee to take over and hold stock held by Howard R. Hughes in the New Theatre Company.

2. It is also agreed that if said Irving Trust Company is not satisfactory to this Court as trustee herein, the parties shall, within two weeks after being so advised by the Court, suggest to the court three other names for consideration as trustee.

3. The trustee shall have power to vote the stock in such manner as in the opinion of the trustee shall be in the best interests of the corporation and not inconsistent with the provisions of this judgment.

4. The stock shall be issued to and shall stand in the name of the trustee as such upon the books of the New Theatre Company, but Howard R. Hughes shall remain the equitable owner.

5. The compensation of the trustee is to be commensurate with services performed and is to be fixed by the Court upon termination of the trust or at such other times as the Court may deem proper upon motion of the trustee.

6. During the existence of the trusteeship, the trustee shall not have any financial interest in the New Picture

Company or the New Theatre Company by way of loans, stock or bond interests, or by way of being represented in the New Picture Corporation through the board of directors or officers. If the trustee is empowered to sell said stock, then at such time as it shall have such power, the trustee shall have no representative on the Board of Directors or as officer of the New Theatre Company. It is also agreed that the trustee, during the period of trusteeship, shall not be connected with Howard R. Hughes by way of loans or participation in enterprises in which Howard R. Hughes is a substantial or controlling stockholder.

7. It is understood by the parties that the plaintiff will move this Court by formal motion returnable during the month of January for an order providing that the terms of this trusteeship shall include a provision empowering and requiring the trustee, if Howard R. Hughes shall not have disposed of it, to sell the stock entrusted to him under the terms and conditions to be established by this Court, at any time after one year from the date of entry of an order upon the government's motion. Howard R. Hughes will contest such motion.

T. A. SLACK,
Attorney for Howard R. Hughes.
PHILIP MARCUS,
Attorney for Plaintiff.

So ordered as to Paragraphs 3, 4, 5, 6, and 7. The Irving Trust Company is hereby appointed trustee, as suggested in Paragraph 1 of the above stipulation.

AUGUSTUS N. HAND,
U. S. C. J.
HENRY W. GODDARD,
U. S. D. J.
ALFRED C. COXE,
U. S. D. J.

U. S. D. J. Filed Dec. 28, 1950. S. D. of N. Y.

APPENDIX "A-3"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

MOTION

Please take notice that upon the affidavit of Philip Marcus, annexed to and made part hereof, and upon all the pleadings and proceedings had herein, the plaintiff will move this Court on the 15th day of February, 1951 at 4 P. M. or as soon thereafter as counsel may be heard, at the Federal Court House, Foley Square, New York City, for the entry of the order attached hereto, amending the order of December 28, 1950, by requiring the trustee of the stock held by Howard R. Hughes in the New Theatre Company to dispose of such stock.

(S.) PHILIP MARCUS,
Attorney for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

ORDER

The Court having considered the motion of the plaintiff, and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that, if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20, 1953 the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered on November 8, 1948 and the other judgments entered in this cause. Disposition may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and, so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed dispositions of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

_____,
United States Circuit Judge.

_____,
United States District Judge.

_____,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., *Defendants*.

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

Philip Marcus, being duly sworn, deposes and says that he is attorney for the plaintiff in the above entitled cause and is familiar with the facts herein recited.

A consent judgment signed personally by Howard R. Hughes was entered by this Court against RKO and Howard R. Hughes on November 8, 1948. Under the terms of Section V of that order, Howard R. Hughes was required within a period of one year from the date of the entry of the judgment to dispose of his holdings of the stock in either the New Picture or the New Theatre Company or deposit with a trustee designated by the Court the shares of stock in one of the companies. Section V also provided that the trust agreement should remain in force until Howard R. Hughes had sold his stock and that the trust should be upon such other terms and conditions as should be prescribed by the Court. This Section also states that during the period of the trust Howard R. Hughes should be entitled to receive the proceeds of the sale of the stock as well as dividends and other distributions made on account of the trusteed shares.

More than two years have elapsed since the entry of the judgment of November 8, 1948, without a sale of the stock or any part of it being made by Howard R. Hughes. Only very recently was the stock trusteed. Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment. At that time he gave a commitment not to ask a further extension. That commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950. During the course of the argument, however, Howard R. Hughes, by his attorney, withdrew his motion and subsequently filed with this Court a letter of May 5, 1950, in which he stated he would trustee his theatre stock.

At the end of last year, RKO separated into a New Picture Company and a New Theatre Company.

It is affiant's considered opinion that there can be no real separation of the RKO Picture Company from the RKO Theatre Company and no complete termination of control of both those companies by Howard R. Hughes, while the latter may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company. Howard R. Hughes has already

filed a statement with this Court that he intends to remain with the Picture Company. Yet if he can merely trustee his stock in the Theatre Company, he can continue under the terms of Section V of the consent judgment to draw dividends from the Theatre Company, and thus he and the Picture Company will continue to have a very real interest in the financial success of the Theatre Company.

The proposed order would give Howard R. Hughes another year within which to endeavor to dispose of the stock, at which time three years from the date of entry of the judgment would have elapsed, during all of which period Howard R. Hughes would have been entitled to draw dividends from the Theatre Company as well as from the Picture Company. The proposed order provides that after such time the trustee shall, as expeditiously as possible, take all necessary steps to dispose of the stock, having in mind that dispositions should not be made which would unreasonably restrain competition. The proposed order also provides that to the extent possible dispositions should be made which would not cause a sacrifice to Howard R. Hughes, but at any rate disposition of the stock should be made within a period of two years from December 29, 1951.

(S.) PHILIP MARCUS,
Special Assistant to the Attorney General.

Sworn and subscribed to before me this 11th day of January 1951.

(S.) HARRY J. PIZZA.

My commission expires —— —, ——.

APPENDIX "A-4"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., *Defendants*.

REPLY TO MOTION OF UNITED STATES OF AMERICA TO AMEND CONSENT DECREE TO REQUIRE SALE OF NEW THEATRE COMPANY STOCK

Howard R. Hughes, without consenting to the trial or determination by this Court in this proceeding of any matters beyond the scope of the expressed terms of the Consent Decree, appears herein specially and moves the Court to dismiss or, in the alternative, to deny the motion of the United States of America referred to in the caption upon the following grounds which will appear as a matter of record in the cause or from the affidavit attached hereto:

1. The Court is without jurisdiction in a proceeding of this kind to alter or enlarge upon the terms of the Consent Decree respecting the liabilities or obligations of Howard R. Hughes, who is a party hereto only to the extent of his voluntary consent.

2. The Consent Decree was no more than a contractual settlement of the pending case to which the Court gave its sanction and to which, *as it was written*, Howard R. Hughes entered his consent. No forced sale of the stock was contemplated by the Consent Decree and the Court has no jurisdiction in a proceeding of this kind to enter any order or to require the performance of any act not reasonably necessary to carry out the *expressed terms of the Consent Decree*.

3. In any event the motion of the United States of America is premature because:

(a) The New Theatre Company stock has not been in existence except since January 1, 1951.

(b) There is no showing that Howard R. Hughes is not making a bona fide effort to dispose of one or the other of the stocks which he received in exchange for his old Radio-Keith-Orpheum Corporation stock.

(c) This proceeding could be as well brought for all purposes at a later date as at the present time.

(d) A present order such as is sought by the United States of America would be an unfair detriment to a free market for Howard R. Hughes.

4. The order requested by the United States of America would be in violation of the expressed terms of the Consent Decree because it would require sale of the New Theatre Company stock by the trustee even though Howard R. Hughes should prior to that time have disposed of the New Picture Company stock.

(S.) T. A. SLACK,
Attorney for Howard R. Hughes.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

AFFIDAVIT

STATE OF CALIFORNIA,
County of Los Angeles, ss.

T. A. Slack being first duly sworn upon oath deposes and says:

1. That he is an attorney at law, a member of the Bar of the State of Texas, and has the permission of this Court to appear herein as the attorney for Howard R. Hughes.

2. Prior to the entry of the Consent Decree of November 8, 1948 in the above cause deponent represented Radio-Keith-Orpheum Corporation in its negotiations with the Department of Justice of the United States and with the

Commissioner of Internal Revenue of the United States pertaining to a settlement of the above cause insofar as it affected Radio-Keith-Orpheum Corporation. After extensive negotiations, the terms of the Consent Decree were mutually agreed upon by the Department of Justice and Radio-Keith-Orpheum Corporation, subject to the approval of this Court. The other terms of the agreement between the parties, however, at the insistence of the Department of Justice were made subject to incorporating in the Consent Decree Paragraph V thereof (affecting certain stock owned by Howard R. Hughes), and to the consent of Hughes to the entry of the decree.

3. In order to facilitate the settlement of the cause as between the two parties mentioned, Howard R. Hughes did agree to entry of the decree as it was and is written, but at no time did he make any other agreements respecting his stock interest in the defendant corporation and particularly did he not agree that he might be required to sell any of such stock at any time.

4. To the best of affiant's knowledge and belief, at the time the Consent Decree was entered there had been no agreement of settlement reached btween the United States and any other defendant in the cause and no other defendant had agreed to a divorcement between its producing and exhibiting properties. At that time there had been no order of any Court which determined, or gave any substantial indication, that the United States might be successful in its efforts to cause a divorcement between the two types of properties.

5. It was against this background which existed at the time that the duly authorized representatives of the United States freely expressed in the presence of this affiant that the Consent Decree affecting the divorcement set forth therein with respect to RKO would be of substantial advantage and weight in favor of the Government's contentions for divorcement in the cases of the other defendants.

6. At no time at or prior to the entry of the Consent Decree was it ever suggested that Howard R. Hughes would be considered to have any obligation with respect to any of his stock other than those therein set forth. It is not be-

lieved to have been in the minds of any of the parties to the negotiations and certainly was not in the mind of this affiant or Howard R. Hughes that the provision in the Consent Decree relating to the voting trust, viz., "Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court" was anything more than an expression of the necessarily implied powers of the Court to implement the expressed purpose of the trust by any necessary details such as compensation of the trustee, qualifications, etc. No basic right or obligation was contemplated which was not set forth in the decree.

7. The Honorable Attorney General is mistaken in his affidavit that "Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment". The record speaks for itself on the fact that Howard R. Hughes has at no time appeared in this cause or before this Court for any purpose other than to enter his formal consent to the agreed judgment or to agreements or motions filed herein by RKO. Such formal consent by Howard R. Hughes has been necessary in each case because he would not receive his stock in the new companies until after reorganization and any postponement of reorganization necessarily had to postpone the date upon which the new stock which would be issued to him would have to be deposited in the voting trust.

8. When RKO asked for an extension in September of 1949 the Attorney General requested and received from Howard R. Hughes a letter dated September 30, 1949 which was as follows:

"The Attorney General
Department of Justice
Washington, D. C.

United States of America v.
Paramount Pictures, Inc., et al.

Dear Sir:

On behalf of Mr. Howard R. Hughes I am authorized to state to the Department of Justice as follows:

1. In the event that the application of RKO for amendments of the RKO Consent Decree is approved by the Court,

to which amendments Mr. Hughes consented, he will not petition for further extension of the time provided for in Section V of such Decree, within which he must comply with such Section.

2. In making this statement, it is our understanding that if prior to May 8, 1950 Mr. Hughes has not received the stock of the New Theatre Company and the New Picture Company issuable under the Plan of Reorganization, he will comply with the requirements of Section V B of such Decree if he shall file with the Court by such date a statement that he has elected to deposit with the trustee designated by the Court, in accordance with Section V B, his shares of the New Picture Company or the New Theatre Company, as he may elect, when issued to him pursuant to the plan, subject to his right to sell prior to such deposit in accordance with Section V A of such Decree.

Very truly yours,

(S.) RALSTONE R. IRVINE,
Attorney for Howard R. Hughes."

The Honorable Attorney General is again mistaken in his affidavit that "That commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950". The record will show that upon the date in question the defendant *Radio-Keith-Orpheum Corporation* again petitioned this Court for an extension of the time within which it was required to accomplish the separation of its two activities and that again this motion was based entirely upon what was in the supposed best interests of the corporation. Howard R. Hughes was not a party to such motion except to indicate his consent.

9. Since entry of the Consent Decree there have been several negotiations for the purchase of the New Theatre Company stock owned by Howard R. Hughes upon a "when issued" basis. Because New Theatre Company could not come into existence until reorganization and because of the closely integrated capital structure which existed prior to reorganization, extremely difficult problems arose in connection with any contemplated sale by Hughes. From a

practical standpoint, nothing could be transferred to any purchaser in the way of stockholders' rights normally incident to the stock. The actual properties of the theatre corporation necessarily had to remain under the operation and control of its parent until reorganization. It was only on January 1, 1951, that the New Theatre Company stock which has been trusteed by Hughes, was actually issued to him so that a completed sale thereof could actually be accomplished.

10. For many months past, and during negotiations looking toward the possible sale upon a future basis of the New Theatre Company stock by Hughes, there have been persistent statements and misunderstandings to the effect that Howard R. Hughes would be "forced" to sell his stock in one or the other of the companies by various dates which more often than not were named as December 31, 1950. It seemed that no denials or explanations were sufficient to put down this false concept which was the subject of so often repeated assertions.

11. In the opinion of affiant, either the fact or false conclusions that Hughes would be under a compulsion to sell a block of stock of this size and type would necessarily affect adversely the market for it.

12. It is the opinion of affiant that an order of this Court such as that urged by the United States would uselessly tend to depress the possible market for the New Theatre Company stock and would only tend to defeat its own purposes. It is impossible to enter an order which would establish a time limit within which sale of stock would be forced without destroying the right to a free market which Howard R. Hughes possesses under the terms of the Consent Decree.

(S.) T. A. SLACK.

Subscribed and sworn to before me this 9th day of February, 1951.

[SEAL.]

(S.) JOHN S. HODGE,
Notary Public in and
for the State of California,
County of Los Angeles.

My Commission Expires October 19, 1951.

IN THE UNITED STATES DISTRICT COURT FO
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

REQUESTS TO FILE SUPPLEMENTAL AFFIDAVIT

T. A. Slack, attorney for Howard R. Hughes in the abov
cause, requests leave of the Court to file herein, before ren
dition of the final judgment, the supplemental affidavi
attached hereto in order that there may be no misunder
standing of the position and contention of Howard R
Hughes.

(S.) T. A. SLACK,
Attorney for Howard R. Hughes.

IN THE UNITED STATES DISTRICT COURT FO
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

T. A. Slack, attorney for Howard R. Hughes, being dul
sworn on oath deposes and says:

The Government's affidavit and motion is to obtain modi
fication of the terms of the trust in a manner not contem

plated by the Consent Decree. It fails, however, to allege or set forth any change in the present conditions from those which existed at the time of the entry of the Consent Decree. Nor does it set forth any facts which were not clearly foreseeable at such time.

The affidavit of Government's counsel sets forth only two facts which are (1) Hughes has not sold the stock in New Theatre Company and (2) Hughes will receive any dividends from such stock.

The first fact was expressly contemplated in the Consent Decree and the consequences were prescribed. That the second fact would be true was recognized and prescribed for in the Consent Decree.

Thus, the Government's support of its motion is nothing but the "considered opinion" of its present counsel that there can be no "real separation" of RKO Pictures Company from RKO Theatres Company and no "complete termination of control of both these companies" by Mr. Hughes while he "may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company". The considered opinion of counsel who represented the Government when this Consent Decree was signed was to the contrary. Then, the Government considered that its interests would be fully protected without a requirement that Mr. Hughes dispose of his stock interest in either company. Consequently, the Consent Decree gave Mr. Hughes an option either to dispose of his holding of the stock of one or the other of the companies or to deposit the shares of one with a trustee under a "voting trust".

Howard R. Hughes has expressly declined to consent to any determination of his rights in this proceeding. An order may not be made effectively modifying the terms of the Consent Decree because there has been no satisfactory showing by competent evidence in a proceeding for that purpose that there have been such changes in the conditions which require such modification.

The Consent Decree sanctioned an agreement between the United States of America and the other parties thereto in

which substantial benefits were derived by all parties and the Government may not now seek to withdraw from its agreement; in any event without a relitigation of the entire matter.

(S.) T. A. SLACK.

Subscribed and sworn to before me this 21st day of February, 1951.

(S.) DOROTHEA A. O'BRIEN,
Notary Public.

Dorothea A. O'Brien, Notary Public, State of New York No. 24-2925000, Qualified in Kings County Certs. filed with Kings Register and New York County Clerks and Register. Commission expires March 30, 1951.

APPENDIX "A-5"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

against

RADIO-KEITH-ORPHEUM CORP., et al., *Defendants*

ORDER

The Court having considered the motion of the plaintiff and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20th, 1953, the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered in this cause. Disposi-

tion may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed disposition of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

Dated: March 24, 1951.

(S.) AUGUSTUS N. HAND,
U. S. Circuit Judge.
(S.) HENRY W. GODDARD,
U. S. District Judge.
(S.) ALFRED H. COXE,
U. S. District Judge.

(5205)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 336

HOWARD R. HUGHES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief Opposing Motion by United States of America to Affirm.

T. A. SLACK
7000 Romaine Street,
Hollywood 38, California,
Attorney for Appellant, Howard R. Hughes

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-0171.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.....

HOWARD R. HUGHES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief Opposing Motion by United States of America to Affirm.

Jurisdiction Not Disputed by Government.

The Government does not dispute jurisdiction and the grounds therefore set forth in the statement of jurisdiction will not be referred to in this brief.

Discussion of Motion to Affirm.

The motion to affirm suggests no justification for the fact that under the order appealed from appellant would be deprived of some millions of dollars of property without his consent, and without lawful justification therefor.

The motion to affirm neither takes issue with any principle of law or authority referred to in the statement of jurisdiction, nor does it refer to any principle or authority to sustain the order appealed from.

On the contrary, appellee seems to argue, by inference rather than directly, that appellant's right not to be deprived of his property without due process of law is in some way modified by the fact that the order which required his stock to be sold without his consent was termed by its author (appellee) as an order "amending the order appointing the trustee" rather than as one amending the consent decree.

Likewise, by inference appellee seems to contend that the property rights of the appellant were in some way affected by prior orders of the District Court (not appealed from by appellee) which granted certain relief to the corporate defendant, Radio-Keith-Orpheum Corporation. This seems to be argued in connection with appellee's alternative theory that even though the order appealed from is in effect an amendment of the consent decree, nevertheless certain acts of the District Court which postponed the divorcement date for RKO and other orders of the Court which required a divorcement of the theatre interests of certain companies in another case (to which appellant was not even a party) constituted the "new and material circumstances occurring subsequent to the consent decree" which appellee now apparently recognizes for the first time as being necessary for an amendment to the consent decree.

Apparently the Government now finds it necessary to go beyond the record in this case in an effort to support the order appealed from. It refers (improperly) to decrees of divorcement in other cases which were not even offered in evidence in this case. Furthermore, it is not contended that even in those cases any individual stockholder was required by court order to dispose of his stock holdings in any company.

The Facts.

This appeal (from an order requiring the sale of corporate stock) arises from the following material facts:

The Government had brought a civil suit against several motion picture corporations for the purpose of bringing to an end certain practices and situations alleged to be in violation of the Sherman Act. Among many other items of relief, the Government sought in certain of the cases a decree which would require divorcement of the producing end from the distributing end of the motion picture business. After a trial of the cases in the District Court, an appeal to the Supreme Court, and a remand to the District Court, the Government had failed to achieve this objective and obviously had no way of knowing whether or not, or to what extent, if any, such objective might thereafter be achieved.

It was at this stage of the proceedings that the corporate defendant, RKO, and the Government had negotiations which resulted in a severance and settlement of the RKO suit by the consent decree which is the subject matter of this appeal. It is noteworthy that RKO was the first defendant to reach a settlement agreement.

Among many items of relief and concessions to both sides, the consent decree provided for the splitting up of RKO into two new corporations and the distribution of the stock of each to the stockholders of RKO. One new corporation would hold the producing business and the other the exhibiting business.

While such splitting up alone accomplished a technical divorcement of the two ends of the moving picture business, the fact that appellant here might continue through stock ownership to control both corporations caused the

Government to seek certain agreements from appellant which were set forth in Paragraph V of the decree.

Neither appellant here nor any other stockholder of any defendant corporation was a party to the suit and obviously, therefore, it would have been impossible for the Government to secure any affirmative relief against an individual stockholder without serious and far reaching changes in the proceedings which had theretofore been followed.

Notwithstanding this fact, appellant, Howard Hughes, as a contribution to the settlement of the suit against RKO, entered his voluntary consent to Paragraph V of the consent decree. He thereby agreed that he would either dispose of his holdings in one or the other of the two new corporations which were to be formed or that he would deposit his holdings in one or the other in a voting trust with a Trustee appointed by the Court and that such voting trust should remain in effect until he, *Howard Hughes,* should dispose of his stock in one or the other of the new companies and that such voting trust should terminate upon such disposal *by Hughes.*[1]

Having specified in the clearest possible language the nature of the voting trust and its duration and that it should not terminate until the sale of one or the other of the holdings *by Hughes,* it was then provided that the trust should be upon such *other* terms and conditions as

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[1]All emphasis in this brief has been supplied by us.

the District Court might provide. (The Government argues that the "other" terms might include a forced sale even though such is contrary to the specific terms.)

On December 28, 1950, the District Court entered its order appointing Irving Trust Company of New York as trustee under the voting trust provided for in the consent decree and, there being no provision in this order contrary to the terms of the consent decree, appellant duly surrendered to such trustee 929,020 shares of stock of the New Theatre Company. Thereupon, the Assistant Attorney General filed the motion for the District Court "to amend the order appointing the trustee" by entering an order requiring the trustee to sell the Hughes stock unless Hughes himself should sell it within a specified length of time.

Attached to the Government's motion was an affidavit of its Assistant Attorney General which, since there was no offer of evidence, must be taken as the supposed foundation for the Court's action. It is noteworthy that the present attorney for the United States apparently does not attach sufficient significance to this affidavit to mention it in his motion to affirm. This is notwithstanding the fact that except for such affidavit the record is completely devoid of even a pretended excuse for the Court's action.

The affidavit was not offered as evidence and obviously would have been inadmissible if offered. Were it otherwise, it would be sufficient to say of it that it set forth no fact not affirmatively contemplated in the consent decree or thereafter expressly approved by the District

Court *except that in the "considered opinion" of the affiant the Court should enter the order prayed for in order to accomplish the desired result.*

By his original and supplemental replies to the Government's motion, appellant objected to a determination of his rights in this summary proceeding and pointed out that the true nature of the proceeding was to alter or amend the terms of the consent decree to the prejudice of appellant without alleging or offering to prove any facts which would constitute legal justification therefor.

The Government's motion was granted by the Court without receiving any evidence and the order of sale issued, notwithstanding the absence of allegations or proof of any changes in conditions or circumstances or of any fact sufficient in law to justify the modification or ignoring of the affirmative terms of the consent decree theretofore agreed upon by the parties and accepted by the Court.

There is no opinion and one must believe that the District Court was misled by the proponent of the motion into a confusion of the facts and record in this case with other parts of the general litigation against the many other defendants.

It was argued strenuously that *Chrysler Corporation v. United States*, 316 U. S. 556, stood as authority for the summary judgment of the Court which was entered here, but this argument is apparently now abandoned. Certainly it cannot stand as an authority for the result here.

A Substantial Question Is Raised.

It is inconceivable that appellant would have no remedy for the illegal deprivation of property to which he would be subjected by the order appealed from merely because of some strained concept that the District Court might lawfully "amend the order appointing the trustee" and thereby require the trustee to do that which is contrary to the provisions of the consent decree. The Government is here forced to choose between such untenable position on the one hand and the equally untenable position on the other that it was claimed or proved in the District Court that the lawful prerequisites to the *amendment* of the consent decree existed.

It should be kept in mind that it has never been agreed or judicially determined, by the consent decree or otherwise, that any form of interlocking stock ownership would be in violation of law. The contrary was expressly stated in the preamble to the decree.

By the provisions of Paragraph V, the Government expressly agreed to foresake the pursuit of any remedies not specifically set forth and appellant, by voluntarily becoming a party, agreed and bound himself to the specific things therein set forth.

We do not contend that the Government would be powerless to obtain a modification of the consent decree in a proper proceeding and upon proper showing of change in the facts and circumstances upon which the consent decree was based. We do insist, however, that in the absence of some such showing the consent decree will stand as a meaningful thing and it may not be ignored without cause in favor of either party. We submit also that it must be construed reasonably and by recognized principles governing the construction of legal documents.

The possibility was clearly contemplated by the parties and set forth in the consent decree that appellant might not dispose of his holdings in either of the new companies to be formed. Thus, Paragraph V of the consent decree reads in part "Howard R. Hughes shall *either:* (A) Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, * * *; *or* (B) Deposit with a trustee designated by the court of all his shares of the New Picture Company or the New Theatre Company, as he may elect * * *."

Appellant agreed if he did not sell his holdings in one or the other of the new companies he would be bound to certain carefully specified obligations, namely to "* * * deposit with a trustee, * * * all of his shares of the New Picture Company or the New Theatre Company * * * under a *voting trust* agreement whereby the trustee shall *possess and be entitled to exercise* all the *voting rights* of such shares, including the *right to execute proxies and consents* with respect thereto. Such voting trust agreement shall thereafter *remain in force* until *Howard R. Hughes shall have sold his holdings* * * * of the New Picture Company or the New Theatre Company * * * and *upon such sale* * * * such voting trust agreement *shall automatically terminate.*"

Having set forth clearly the basic purposes, duration, and characteristics of the trust, Paragraph V then provides: "Such trust shall be upon such *other* terms or conditions, including compensation to the trustee, as shall be prescribed by the Court." This provision was for the obvious purpose of providing the necessary power to implement the trust *within the framework of its expressed provisions, purposes and limitations.*

That there might be no doubt as to the limitations on the trustee's powers with respect to the stock or the proceeds of any sale *by Hughes*, it was then provided: "During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends * * * on account of the trusteed shares, and proceeds from the sale thereof."[2]

It is contrary to the most elementary rules of construction that the *general* authority with respect to the terms of the voting trust conferred upon the Court by the terms of Paragraph V would be considered as nullifying or superseding the *specific* provisions of the same paragraph. The principles governing the construction of the terms of the consent decree are no different from those governing statutes and all other writings defining human rights.

In this respect we think it sufficient to quote from an expression of these principles contained in *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 76 L. Ed. 704:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * * The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * *."

The Government's contention, contrary to the elementary rules just stated, is that the general provisions of Para-

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[2]Paragraph V of the Consent Decree is set out in full in Appendix A hereto.

graph V empower the Court to ignore its specific provisions.

Nothing could be more clear than that the District Court has effectively altered the terms of the consent decree upon mere motion of the Government and without any basis recognized as sufficient in law for this purpose such as fraud or deception upon the court or a change in the circumstances and conditions not contemplated by the parties or the court at the time of the entry of the decree.

We believe it to be well settled by the decisions of this and other federal courts that a consent decree, like any other decree, is fully and finally determinative of the rights of the parties thereto unless it is set aside for fraud or unless there is a showing, by proper evidence and in a proper proceeding, of changed facts and conditions which would cause it to be equitable to modify the decree.

It has been clearly held that express reservation of jurisdiction in decrees granting injunctions adds nothing to the inherent power of a court over decrees of continuing injunction. *A fortiori* any expressed reservation of jurisdiction for the purposes of amending or modifying must be construed to mean that such amendments or modifications may be made *only upon proper showing.*

We quote from *United States v. Radio Corporation of America,* 46 Fed. Supp. 654, because it is such a clear expression of the law in its particular application to this appeal:

> "The Government has moved to vacate the consent decrees which were heretofore entered in this suit pursuant to formal written stipulations of the parties. *The motion is based upon the sole ground that in the opinion of the Department of Justice the decrees do not now promote the public interest.* The motion is

vigorously opposed by the defendants. It presents the question whether a consent decree may be vacated solely upon the ground stated and *without proof of any change in circumstances since its entry.* A subsidiary question is whether the decrees conferred benefits upon the defendants. If they did, the Government concedes that its motion must be denied. After full consideration I have reached the conclusion that the first question must be answered in the negative and the second in the affirmative. I shall state briefly my reasons for reaching these conclusions. * * *

"'I think it is clear, as Justice Frankfurter suggested in his dissenting opinion in *Chrysler Corporation v. United States,* 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed. ....., that the modification or vacation of a consent decree previously entered involves the same duty of the court independently to determine that the action is equitable and in the public interest.' Accordingly, I cannot accede to the contention of the Government that the sole basis of the consent decree was the Attorney General's representation to the court that it would provide suitable relief concerning the matters charged in the petition, and that consequently his present representation that it no longer serves the public interest requires the court, in the absence of some benefit to the defendants, to vacate the decree without evidence or agreement.

"Furthermore I am satisfied that the defendants derived substantial benefit from the consent decrees. It has been held that such a decree in an anti-trust case binds the Government as well as the defendants (*United States v. International Harvester Co.,* 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302), even though it later appears that it was inadequate when entered, for the agreement upon which it is based is within the power of the Attorney General to make and

his authority to determine what relief will satisfy the requirements of the law 'includes the power to make erroneous decisions as well as correct ones.' *Swift & Co. v. United States,* * * * In the present case the Attorney General determined that certain relief short of that prayed for would satisfy the public interest and he agreed to the entry of decrees terminating the suit by granting that relief. Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. * * * This is a very real benefit of which they would be deprived were the Government's motion to be granted.

"I do not overlook the fact that consent decrees may be set aside for lack of actual consent to the decrees as entered, for fraud in their procurement, or for lack of federal jurisdiction. * * * No such ground for vacating them is asserted here, however. Likewise I fully recognize the power of this court to modify the decrees upon a showing of a change in circumstances since their entry requiring such modification. * * * It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. * * *"

It is clear from the authorities that the term "purpose of the original *decree*" should not be confused with the opposing purposes of the *parties* to it. On the contrary, the purpose of the *decree* always is to *settle the rights of the parties in a specified manner.*

The leading authority from the Supreme Court is *United States v. Swift & Co.*, 286 U. S. 106, opinion by Mr. Justice Cardozo. After extensive litigation the consent decree was entered specifically prohibiting the defendant Swift & Co. from carrying on certain practices. The decree contained the broadest provision for continuing jurisdiction, namely, "and for the purpose of entertaining at any time any application which the parties may make." Swift & Co. filed its bill for modification of the decree alleging *changes of conditions* and that the provisions of the original decree were no longer equitable. Extensive evidence was introduced in the trial court in support of the allegations. The Court first disposed of the question of its *power* to modify the decree as follows:

> *"We are not doubtful of the power of a court of equity to modify an injunction* in adaptation to *changed conditions* though it was entered by consent. * * * *Power to modify the decree was reserved by its very terms,* and so from the beginning went hand in hand with its restraints. *If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery.* A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. * * * The result is all one whether the decree has been entered after

litigation or by consent. * * * In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned *through changing circumstances* into an instrument of wrong."

The Court then turned to the question of *what is required to be shown* by the moving party before a court *will* modify a consent decree. In reversing the judgment of the lower court the Supreme Court said there had *not been sufficient showing* to justify the modification. The following is from the opinion:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in *changing a decree.* The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. *We are not at liberty to reverse under the guise of readjusting.* Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the *changes* are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

"* * * Wisely or unwisely, they submitted to these restraints upon the exercise of powers that

would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall."

An earlier Supreme Court case was *United States v. International Harvester Company*, 274 U. S. 693, opinion by Mr. Justice Sanford. This was an appeal from a decree of a three judge court which dismissed a *supplemental petition* of the United States seeking to modify an earlier consent decree in an anti-trust suit. The decree sought to be amended contained an expressed reservation of jurisdiction that "the United States shall have the right to such further relief herein as shall be necessary to restore said competitive conditions and to bring about a situation in harmony with law; * * *."

The decree sought to be amended had required the sale by International Harvester of certain of its operating properties and this had been done. The Government alleged that the purpose of its supplemental petition was "to restore competitive conditions in interstate business in harvesting machines and other agricultural implements, and bring about a situation of harmony with law." Specifically it alleged that the properties which defendant had been required to sell under the original decree had constituted such a negligible part of its output that the original decree was inadequate to accomplish its declared purpose. Further relief was sought to require defendant to divide into three separate concerns. The Government's petition was answered and an examiner was appointed and evidence taken to determine the facts.

It was the Government's contention that the declared purpose of the decree sought to be amended was to restore

competitive conditions in the harvesting machine industry as they had existed in 1902 and that the sole test to be applied in determining whether the decree had accomplished its purpose was whether the competitive conditions had in fact been restored.

The consent decree sought to be amended resulted from an agreed settlement pending an appeal from a decree which *required a split-up of the company*. The consent decree's terms included specific requirements and limitations upon the method of doing business but *omitted the requirement of split-up*.

In denying the relief sought by the Government, the Court clearly recognized that the *purpose* of a consent decree is to settle the rights of the litigants *in a specified manner* and to put at rest the issues. We quote from the opinion:

> "The basic contention of the Government here is that the declared purpose of the decree of 1918 was to restore competitive conditions in the harvesting machine industry substantially as they had existed in 1902 before the International Company was formed by the combination of the five original companies, that is, to so increase the amount of competition and the number of competitors as to restore, in a 'quantitative' sense, 'the free and open competition which existed when the combination was formed'; and that therefore the sole test to be applied in determining whether the decree has accomplished its purpose is whether it has had the effect actually to restore in the harvesting machine industry the competitive conditions which obtained prior to 1902.' *We cannot sustain this contention. This is entirely inconsistent with the purpose of the consent decree*, both as appears from its terms and as it was apparently construed by the District

Court itself. *Its plain and evident purpose was to substitute for the requirement in the previous decrees that the International Company be divided into separate and distinct corporations, the requirements that, in order to establish 'competitive conditions' bringing about 'a situation in harmony with law,' the International Company should limit its sales agency in any town or city to a single representative, and should sell three of its harvesting machine lines to independent manufacturers* of agricultural implements; and to give the United States the right to further relief only 'in the event' that within eighteen months after the termination of the war such competitive conditions had not been established. *And a construction of this decree by which, although its requirements have been fully complied with and lawful competitive conditions established, the United States would nevertheless be entitled to further relief by the division of the International Company into separate and distinct corporations for the purpose of restoring the actual competitive conditions that had existed sixteen years before the entry of the consent decree, would plainly be repugnant to the agreement approved by the court and embodied in the decree,* which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely."

A careful analysis of the *Harvester* case discloses a close similarity to this case in the following respects:

1. The relief sought by the Government was to add a remedy not mentioned in the decree in each case.

2. The Government in each case failed to show any change of conditions and indeed failed to set up a change of conditions as the basis for the relief sought.

3. In each case the Government seemed to mistake the purpose of a consent decree to be to create a state of *unsettled* rights of the parties which the Government might change at will and without cause, rather than to *settle* the rights of the parties in a specified manner.

In oral argument of this case the Government's attorney referred to *Chrysler Corporation v. United States,* 316 U. S. 556. That case should never be considered except in connection with the companion case of *Ford Motor Company v. United States,* 335 U. S. 303, which, in respect to the matter here under consideration, was identical in its facts, except that the action occurred at a later date. In the *Chrysler* case, Mr. Justice Byrnes wrote the majority opinion which consumed somewhat less than two pages in the Reporter and which made no reference to authority except the *Swift* case. Mr. Justice Frankfurter wrote a vigorous dissent which was admirably summed up in the following sentences:

> "* * * Regard for the proper administration of justice, which makes determinations depend upon proof and *not upon unsupported assertions of one of the litigants,* is a vital aspect of the public interest. *The burden obviously rests upon the Government to show good cause for disregarding an expressed provision in a carefully framed decree,* and extending to twice its original duration the period of restraint against Chrysler. So to enlarge the burden of the decree without any such showing by the Government is a one-sided restriction of Chrysler's freedom of action, at least of its right to prove that the restricted action is innocent. Instead of exacting such proof from the Government, the District Court cast upon Chrysler the duty of showing that it would not be prejudiced

if the fetters remained after the period fixed by the decree. He who seeks relief from equity has the burden of showing that he is entitled to it. * * *."

In the later case of *Ford Motor Company v. United States* almost identical facts growing out of the identical situation were involved, but in that case Mr. Justice Frankfurter wrote the majority opinion and held directly in accord with his dissent in the *Chrysler* case. A careful study of the two decisions could but lead to the conclusion that though the *Chrysler* case is not overruled, it will not be extended beyond the particular results there reached.

The *Chrysler* case permitted nothing more than the extension of time during which an *agreed and expressly stated prohibition* should be continued in order to accomplish the *expressly stated pattern* of the consent decree, namely, that Chrysler and General Motors should be subjected to identical prohibitions. It was an extension of time, not an added remedy as is sought here.

Confidence in the integrity of a consent decree is an important factor in the settlement of many complicated suits. Adherence to proper procedure is as essential to the administration of justice as is the fundamental law.

We respectfully submit the judgment or order appealed from must be set aside or held for naught and appellant prays for such other relief from this Court as may be just and proper.

Respectfully submitted,

T. A. Slack,

Attorney for Appellant, Howard R. Hughes.

Service of the within and receipt of a copy thereof is hereby admitted this_____day of May, A. D. 1951.

_____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 86.

HOWARD R. HUGHES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Final Judgment of the United States District Court for the Southern District of New York.

BRIEF OF APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Final Judgment of the United States District Court for the Southern District of New York.

BRIEF OF APPELLANT.

OPINIONS BELOW.

The judgment appealed from was entered by the Three Judge Court below without opinion.

JURISDICTION.

The suit is in equity, brought in the District Court of the United States for the Southern District of New York by the United States under the Sherman Anti-Trust Act (R.

87). The final judgment (called an "Order") of the Three Judge District Court appealed from was entered on March 24, 1951 (R. 211).

Jurisdiction of the Supreme Court to review such decree by direct appeal is conferred by Title 15 United States Code Section 29 and by Title 28 United States Code Section 1253.

The "Order" appealed from is in fact a "final judgment" from which a direct appeal lies to this Court. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120; 89 L. Ed. 2092.

QUESTION PRESENTED.

Howard R. Hughes, not theretofore a party to a civil anti-trust suit against a corporate defendant, voluntarily entered his consent to a decree which required him either to sell or to deposit in a voting trust until he should sell certain capital stock of a corporation to be acquired by him as a result of a reorganization. The consent decree specifically provided that the voting trust should "*remain in force*[1] until *Howard R. Hughes* shall have sold his holdings * * *". After enumerating certain other specific characteristics of the trust and having so specified its duration, the consent decree then provided that the trust should be upon "such *other* terms or conditions, * * * as shall be prescribed by the Court".

The question presented is whether the District Court, upon simple motion of the Government, without hearing competent evidence of any kind and in the absence of any previous findings of facts relating to the right of Howard R. Hughes to continue to own such stock, may order the Court's trustee to dispose of it, contrary to the terms of the consent decree.

STATUTES INVOLVED.

This appeal involves the construction of no statute.

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[1] All emphasis in this brief has been supplied by us.

STATEMENT.

This appeal (from an order requiring the sale of corporate stock) arises from the following material facts:

The Government had brought a civil suit against several motion picture corporations for the purpose of bringing to an end certain practices and situations alleged to be in violation of the Sherman Act (R. 2). Among many other items of relief, the Government sought in certain of the cases a decree which would require divorcement of the producing end from the distributing end of the motion picture business (R. 61). After a trial of the cases in the District Court, an appeal to the Supreme Court, and a remand to the District Court (R. 169), the Government had failed to achieve this objective and obviously had no way of knowing whether or not, or to what extent, if any, such objective might thereafter be achieved.

It was at this stage of the proceedings that the corporate defendant, RKO, and the Government had negotiations which resulted in a severance and settlement of the RKO suit by the consent decree which is the subject matter of this appeal (R. 170).

Among many items of relief and concession to both sides, the consent decree provided for the splitting up of RKO into two new corporations and the distribution of the stock of each to the stockholders of RKO (R. 171). One new corporation (called "New Picture Company") would hold the producing business and the other (called "New Theatre Company") the exhibiting business.

While such splitting up, without further relief, accomplished a technical divorcement of the two ends of the moving picture business, the possibility that appellant Howard Hughes, through ownership of approximately 24% of the stock of each company, might continue to control both corporations caused the Government to seek certain voluntary agreements from him which were set forth in Paragraph V of the decree (R. 185).

Neither appellant nor any other stockholder of any defendant corporation was a party to the suit and obviously, therefore, it would have been impossible for the Government to secure any affirmative relief against appellant except by his agreement.

Notwithstanding this fact, appellant, as a contribution to the settlement of the suit against RKO, entered his voluntary consent to Paragraph V of the consent decree (R. 188). He thereby agreed that he would *either* dispose of his holdings in one or the other of the two new corporations which were to be formed *or* that he would deposit his holdings in one or the other in a voting trust with a trustee appointed by the Court and that *such voting trust should remain in effect until he, Howard Hughes,* should dispose of his stock in one or the other of the new companies and that such voting trust should terminate upon such disposal *by Hughes.*

Having specified the nature of the voting trust, its duration, and that it should not terminate until the sale of one or the other of the holdings *by Hughes,* it was then provided that the trust should be upon such *other* terms and conditions (R. 186) as the District Court might provide.

On December 28, 1950, the District Court entered its order appointing Irving Trust Company of New York as trustee under the voting trust provided for in the consent decree and, there being no provision in this order contrary to the terms of the consent decree, appellant duly surrendered to such trustee 929,020 shares of capital stock of the New Theatre Company (R. 199, 200). Thereupon, the Assistant Attorney General filed the motion requesting the District Court "to amend the order appointing the trustee" by entering an order requiring the trustee to sell the Hughes stock unless Hughes himself should sell it within a specified length of time (R. 200).

Attached to the Government's motion was an affidavit of its Assistant Attorney General which, since there was no offer of evidence, must be taken as the supposed foundation

for the request and the Court's action (R. 201). Except for such affidavit the record is completely devoid of even a pretended excuse for the Court's action.

The ex parte affidavit was not offered as evidence and obviously would have been inadmissible if offered. Were it otherwise, it would be sufficient to say of it that it set forth no fact not either affirmatively contemplated in the consent decree or thereafter expressly approved by the District Court except that in the "considered opinion" of the affiant the Court should enter the order prayed for in order to accomplish the desired result (R. 202).

By his original and supplemental replies to the Government's motion, appellant objected to a determination of his rights in this summary proceeding and pointed out that the true nature of the proceeding was to alter or amend the terms of the consent decree to the prejudice of appellant without alleging or offering to prove any facts which would constitute legal justification therefor (R. 203, 209).

The Government's motion was granted by the Court notwithstanding the complete absence of evidence or any offer thereof and on March 24, 1951, the Court's order was entered (R. 211) requiring the Court's trustee of the Hughes' stock to dispose of it unless Hughes should have disposed of it by February 20, 1953. There was neither allegation nor proof of any change in the conditions or circumstances which existed at the time of the entry of the consent decree nor of any other fact purporting to be a foundation for depriving appellant of his property. The Government's affidavit attached to the motion merely set forth former proceedings in the case (by others than appellant) and that in the "considered opinion" of the Assistant Attorney General the order should be granted.

SPECIFICATION OF ERROR.

The Court erred in entering its order of March 24, 1951, requiring its trustee, Irving Trust Company, to dispose of appellant's stock unless appellant should dispose of it by a certain date because:

(a) There is no evidence or adjudication that appellant's ownership of the stock is in violation of or contrary to law;

(b) The consent decree, to which appellant voluntarily subscribed, neither requires sale of the stock by appellant nor authorizes the Court to force a sale upon him;

(c) There has been no allegation and proof or even evidence or any fact sufficient in law to sustain an amendment of the consent decree in this respect or to sustain the entry of an order in direct conflict with its clear intent and purpose.

SUMMARY OF ARGUMENT.

The property rights of a party, guaranteed by a consent decree to which he voluntarily subscribed, may not be summarily altered to his prejudice without his consent except upon a showing in a proper proceeding and upon competent evidence that there is some legally sufficient foundation for such alteration.

ARGUMENT.

It has never been judicially determined that the ownership by appellant of a 24% stock interest in each of the new corporations is in violation of law.

The consent decree expressly provided that neither its entry nor any statement, provision, or requirement contained in it should be construed as an admission or adjudication or evidence that the allegations of the complaint or any of them were true (R. 171, 172).

Prior to appellant's voluntary subscription to the consent decree the Government had brought no suit against him or his predecessor in title and had taken no measures looking toward a forced sale.

Obviously, therefore, to determine the rights of the parties with respect to the stock involved we must look to the

terms of the consent decree and to the law which governs its construction, force, and effect.

For convenience, Paragraph V of the consent decree is here set forth with emphasis upon certain words and phrases:

"Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of eighteen months from the date hereof, Howard R. Hughes shall *either:*

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; *or*

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre Company, as he may elect, *under a voting trust agreement* whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. *Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company* to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and *upon such sale and transfer such voting trust agreement shall automatically terminate.* Such trust shall be upon such *other* terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees."

We do not contend that the Government would be powerless to obtain a modification of the consent decree in a proper proceeding and upon proper showing of change in the facts and circumstances upon which the consent decree was based. We do insist, however, that in the absence of some such showing the consent decree will stand as a meaningful thing and it may not be ignored without cause in favor of either party. We submit also that it must be construed reasonably and by recognized principles governing the construction of legal documents.

The possibility was clearly contemplated by the parties and set forth in the consent decree that appellant would not dispose of his holdings in either of the new companies to be formed. Thus, Paragraph V of the consent decree reads in part "Howard R. Hughes shall *either:* (A) Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, * * *; *or* (B) Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre Company, as he may elect * * * ".

Appellant agreed if he did not sell his holdings in one or the other of the new companies he would be bound to certain carefully specified obligations, namely to " * * * deposit with a trustee * * * all of his shares of the New Picture Company or the New Theatre Company * * * under a *voting trust* agreement whereby the trustee shall *possess and be entitled to exercise* all the *voting rights* of such shares, including the *right to execute proxies and consents* with respect thereto. Such voting trust agreement shall thereafter *remain in force* until *Howard R. Hughes shall have sold his holdings* * * * of the New Picture Company or the New Theatre Company * * * and *upon such sale* * * * such voting trust agreement *shall automatically terminate*".

Having set forth clearly the basic purposes, duration, and characteristics of the trust, Paragraph V then provides: "Such trust shall be upon such *other* terms or conditions, including compensation to the trustee, as shall be

prescribed by the Court". This provision was for the obvious purpose of providing the necessary power to implement the trust *within the framework of its expressed provisions, purposes, and limitations.*

That there might be no doubt as to the limitations on the trustee's powers with respect to the stock or the proceeds of any sale *by Hughes*, it was then provided: "During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends * * * on account of the trusteed shares, and proceeds from the sale thereof".

The Government has argued in effect that the consent decree should be construed as if it had provided that the trust should be upon such "other *or different* terms" as the Court might prescribe. Such construction does violence to the plain language of the decree as well as the elementary principles of construction of writings. The principle applicable here is illustrated from the opinion in *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204 at 208; 76 L. Ed. 704:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * * The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * * *"*

The Government's contention, contrary to the elementary rules just stated, is that the general provisions of Paragraph V empower the Court to ignore its specific provisions.

The District Court has effectively altered the terms of the consent decree upon mere motion of the Government and without any basis recognized as sufficient in law for this purpose such as fraud or deception upon the Court or a change in the circumstances and conditions not contemplated by the parties or the Court at the time of the entry of the decree.

It is well settled by the decisions of this and other federal courts that a consent decree, like any other decree, is fully and finally determinative of the rights of the parties thereto unless it is set aside for fraud or unless there is a showing, by proper evidence and in a proper proceeding, or changed facts and conditions which would cause it to be equitable to modify the decree.

The Government has argued in effect that because the District Court reserved jurisdiction over this consent decree the Court may alter or amend it at will, unfettered by necessity for any legal process to insure that the rights of a party shall not be unlawfully invaded. Such is not the law. On the contrary, reserved jurisdiction over any decree can do no more than to keep the case open for the entry of any future orders or amendments *upon proper showing.*

We quote from *United States* v. *Radio Corporation of America*, 46 F. Supp. 654, at 655 and 656, D. C. Del. (1942), because it is such a clear expression of the law in its particular application to this appeal:

> "The Government has moved to vacate the consent decrees which were heretofore entered in this suit pursuant to formal written stipulations of the parties. *The motion is based upon the sole ground that in the opinion of the Department of Justice the decrees do not now promote the public interest.* The motion is vigorously opposed by the defendants. It presents the question whether a consent decree may be vacated solely upon the ground stated and *without proof of any change in circumstances since its entry.* A subsidiary question is whether the decrees conferred benefits upon the defendants. If they did, the Government concedes that its motion must be denied. After full consideration I have reached the conclusion that the first question must be answered in the negative and the second in the affirmative. I shall state briefly my reasons for reaching these conclusions. • • •
>
> "I think it is clear, as Justice Frankfurter suggested in his dissenting opinion in *Chrysler Corporation* v. *United States*, 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed.

1668, that the modification or vacation of a consent decree previously entered involves the same duty of the court independently to determine that the action is equitable and in the public interest. Accordingly, I cannot accede to the contention of the Government that the sole basis of the consent decree was the Attorney General's representation to the court that it would provide suitable relief concerning the matters charged in the petition, and that consequently his present representation that it no longer serves the public interest requires the court, in the absence of some benefit to the defendants, to vacate the decree without evidence or agreement.

"Furthermore I am satisfied that the defendants derived substantial benefit from the consent decrees. It has been held that such a decree in an anti-trust case binds the Government as well as the defendants (*United States* v. *International Harvester Co.*, 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302), even though it later appears that it was inadequate when entered, for the agreement upon which it is based is within the power of the Attorney General to make and his authority to determine what relief will satisfy the requirements of the law 'includes the power to make erroneous decisions as well as correct ones.' *Swift & Co.* v. *United States*, 276 U. S. 311, 331, 332. * * * In the present case the Attorney General determined that certain relief short of that prayed for would satisfy the public interest and he agreed to the entry of decrees terminating the suit by granting that relief. Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. * * * This is a very real benefit of which they would be deprived were the Government's motion to be granted.

"I do not overlook the fact that consent decrees may be set aside for lack of actual consent to the decrees as entered, for fraud in their procurement, or for lack of federal jurisdiction. * * * No such ground for vacating them is asserted here, however. Likewise I fully recog-

nize the power of this court to modify the decrees upon a showing of a change in circumstances since their entry requiring such modification. * * * It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. * * * "

It is clear from the authorities that the term "purpose of the original *decree*" should not be confused with the opposing purposes of the *parties* to it. On the contrary, the purpose of the *decree* always is to *settle the rights of the parties in a specified manner.*

The leading authority from the Supreme Court is *United States* v. *Swift & Co.*, 286 U. S. 106, 114, 119, opinion by Mr. Justice Cardozo. After extensive litigation the consent decree was entered specifically prohibiting the defendant Swift & Co. from carrying on certain practices. The decree contained the broadest provision for continuing jurisdiction, namely, "and for the purpose of entertaining at any time any application which the parties may make." Swift & Co. filed its bill for modification of the decree alleging *changes of conditions* and that the provisions of the original decree were no longer equitable. Extensive evidence was introduced in the trial court in support of the allegations. The Court first disposed of the question of its *power* to modify the decree as follows, at page 114:

> "*We are not doubtful of the power of a court of equity to modify an injunction* in adaptation to *changed conditions* though it was entered by consent. * * * *Power to modify the decree was reserved by its very terms,* and so from the beginning went hand in hand with its restraints. *If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery.* A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing con-

duct or conditions and are thus provisional and tentative. * * * The result is all one whether the decree has been entered after litigation or by consent. * * * In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned *through changing circumstances* into an instrument of wrong."

The Court then turned to the question of *what is required to be shown* by the moving party before a court *will* modify a consent decree. In reversing the judgment of the lower court the Supreme Court said there had *not been sufficient showing* to justify the modification. The following is from the opinion at page 119:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in *changing a decree*. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. *We are not at liberty to reverse under the guise of readjusting.* Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the *changes* are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

"* * * Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall."

An earlier Supreme Court case was *United States* v. *International Harvester Company*, 274 U. S. 693, 702, 703, opinion by Mr. Justice Sanford. This was an appeal from a decree of a three judge court which dismissed a *supplemental petition* of the United States seeking to modify an earlier consent decree in an anti-trust suit. The decree sought to be amended contained an expressed reservation of jurisdiction that "the United States shall have the right to such further relief herein as shall be necessary to restore said competitive conditions and to bring about a situation in harmony with law; * * *."

The decree sought to be amended had required the sale by International Harvester of certain of its operating properties and this had been done. The Government alleged that the purpose of its supplemental petition was "to restore competitive conditions in interstate business in harvesting machines and other agricultural implements, and bring about a situation of harmony with law." Specifically it alleged that the properties which defendant had been required to sell under the original decree had constituted such a negligible part of its output that the original decree was inadequate to accomplish its declared purpose. Further relief was sought to require defendant to divide into three separate concerns. The Government's petition was answered and an examiner was appointed and evidence taken to determine the facts.

It was the Government's contention that the declared purpose of the decree sought to be amended was to restore competitive conditions in the harvesting machine industry as they had existed in 1902 and that the sole test to be applied in determining whether the decree had accomplished its purpose was whether the competitive conditions had in fact been restored.

The consent decree sought to be amended resulted from an agreed settlement pending an appeal from a decree which *required a split-up of the company*. The consent decree's terms included specific requirements and limita-

tions upon the method of doing business but *omitted the requirement of split-up.*

In denying the relief sought by the Government, the Court clearly recognized that the *purpose* of a consent decree is to settle the rights of the litigants *in a specified manner* and to put at rest the issues. We quote from the opinion at pages 702-3:

> "The basic contention of the Government here is that the declared purpose of the decree of 1918 was to restore competitive conditions in the harvesting machine industry substantially as they had existed in 1902 before the International Company was formed by the combination of the five original companies, that is, to so increase the amount of competition and the number of competitors as to restore, in a 'quantitative' sense, 'the free and open competition which existed when the combination was formed'; and that therefore the sole test to be applied in determining whether the decree has accomplished its purpose is whether it 'has had the effect actually to restore in the harvesting machine industry the competitive conditions which obtained prior to 1902.' *We cannot sustain this contention. This is entirely inconsistent with the purpose of the consent decree,* both as appears from its terms and as it was apparently construed by the District Court itself. *Its plain and evident purpose was to substitute for the requirement in the previous decrees that the International Company be divided into separate and distinct corporations, the requirements that, in order to establish 'competitive conditions' bringing about 'a situation in harmony with law,' the International Company should limit its sales agency in any town or city to a single representative, and should sell three of its harvesting machine lines to independent manufacturers* of agricultural implements; and to give the United States the right to further relief only 'in the event' that within eighteen months after the termination of the war such competitive conditions had not been established. *And a construction of this decree by which, although its requirements have been fully complied with and lawful competitive conditions established, the United States would nevertheless be entitled to further*

relief by the division of the International Company into separate and distinct corporations for the purpose of restoring the actual competitive conditions that had existed sixteen years before the entry of the consent decree, would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely."

A careful analysis of the *Harvester* case discloses a close similarity to this case in the following respects:

1. The relief sought by the Government was to add a remedy not mentioned in the decree in each case.

2. The Government in each case failed to show any change of conditions and indeed failed to set up a change of conditions as the basis for the relief sought.

3. In each case the Government seemed to mistake the purpose of a consent decree to be to create a state of *unsettled* rights of the parties which the Government might change at will and without cause, rather than to *settle* the rights of the parties in a specified manner.

In oral argument of this case the Government's attorney referred to *Chrysler Corporation* v. *United States*, 316 U. S. 556. That case should never be considered except in connection with the companion case of *Ford Motor Company* v. *United States*, 335 U. S. 303, which, in respect to the matter here under consideration, was identical in its facts, except that the action occurred at a later date. In the *Chrysler* case, Mr. Justice Byrnes wrote the majority opinion which consumed somewhat less than two pages in the Reporter and which made no reference to authority except the *Swift* case. Mr. Justice Frankfurter wrote a vigorous dissent which was admirably summed up in the following sentences, at pages 570 and 571:

"* * * Regard for the proper administration of justice, which makes determinations depend upon proof and *not upon unsupported assertions of one of the liti-*

gants, is a vital aspect of the public interest. *The burden obviously rests upon the Government to show good cause for disregarding an expressed provision in a carefully framed decree*, and extending to twice its original duration the period of restraint against Chrysler. So to enlarge the burden of the decree without any such showing by the Government is a one-sided restriction of Chrysler's freedom of action, at least of its right to prove that the restricted action is innocent. Instead of exacting such proof from the Government, the District Court cast upon Chrysler the duty of showing that it would not be prejudiced if the fetters remained after the period fixed by the decree. He who seeks relief from equity has the burden of showing that he is entitled to it. * * *."

In the later case of *Ford Motor Company* v. *United States* almost identical facts growing out of the identical situation were involved, but in that case Mr. Justice Frankfurter wrote the majority opinion and held directly in accord with his dissent in the *Chrysler* case. A careful study of the two decisions could but lead to the conclusion that though the *Chrysler* case is not overruled, it will not be extended beyond the particular results there reached.

The *Chrysler* case permitted nothing more than the extension of time during which an *agreed and expressly stated prohibition* should be continued in order to accomplish the *expressly stated pattern* of the consent decree, namely, that Chrysler and General Motors should be subjected to identical prohibitions. It was an extension of time, not an added remedy as is sought here.

Confidence in the integrity of a consent decree is an important factor in the settlement of many complicated suits. Adherence to proper procedure is as essential to the administration of justice as is the fundamental law.

CONCLUSION.

We respectfully submit that the judgment or order appealed from should be set aside and held for naught and that the case should be remanded to the District Court for the Government's motion there to be dismissed or denied unless it be amended to allege facts sufficient in law to authorize an amendment of the consent decree in the respect prayed for by the Government and unless proof of such facts be duly made by competent evidence and appellant prays for such other relief as to this Court may seem proper.

Respectfully submitted,

T. A. SLACK,
Attorney for Appellant,
Howard R. Hughes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 86.

HOWARD R. HUGHES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Acknowledgment of Service.

Due service according to the rules of the Supreme Court of five copies of the within Brief of Appellant is hereby acknowledged.

Dated this 17th day of December, 1951.

Attorney for Appellee.

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UNITED STATES OF AMERICA, *Appellee*.

On Appeal From Final Judgment of the United States District Court for the Southern District of New York.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

The brief for the United States avoids a forthright presentation or admission of the facts because:

1. It avoids quotations from or direct references to the actual wording of the consent decree and resorts to unfairly limited quotations and argumentative conclusions as to its meaning.

2. It does not admit squarely that no evidence was received to support the order appealed from, but states

unsupported conclusions, seemingly as if they were facts from the record.

3. It repeatedly refers to proceedings in cases theretofore severed from this case and which occurred after the entry of the consent decree here involved, and the implications of such references may not be verified from the record, even though they were otherwise proper to be considered here.

Apparent in the Government's brief is the same type of argument which may well have misled the District Court. There is a tendency to confuse the issues of fact and law by repeated references to anti-trust suits against the other motion picture companies; by loosely attributing to appellant acts or activities in which he had no part and by arguing the most vague generalities which have no support in reason or in precedent.

The Government's brief (page 4) asserts that the consent decree "* * * provided, *inter alia*, for divorcing RKO's exhibition business from its production and distribution business. * * *" Aside from a representation (R. 171) with respect to a specific plan of reorganization which has been in fact carried out exactly as written, the consent decree consists of specific injunctions. No part of it is couched in generalities, later to be construed by the Court, as might easily be implied from the assertion.

The Government states (Brief, page 5) "* * * Section V of the judgment provided for disposition of appellant's stock in one or the other new companies within a year from the date of the judgment, and gave him the option of selling the stock himself or turning it over to a trustee who shall be entitled to vote the stock. * * *" Such statement is untrue. The consent decree clearly and unambiguously provided that appellant should have the *option "either"* to dispose of his stock *"or"* to put it in the voting trust.

It is improper for appellee to refer to proceedings in the Paramount case which occurred after the severance and settlement of this cause (Brief, page 6).

It is improper for appellee to refer (Brief, page 7) to Record 242, 247-248 as if it were evidence of an asserted fact when the reference is to unsupported assertions contained in the oral argument of Government counsel in the District Court.

Page 8 of the Government's brief consists entirely of unsupported assertions respecting actions by RKO (not appellant) which were expressly approved by the District Court and respecting matters without the record here such as claimed oral conversations between counsel respecting motions to be filed in the District Court.

On page 10 of its brief the Government states "Section V is an integral part of that decree. It provided that, within the year, appellant, the dominant stockholder in RKO, would dispose of his stock in one of the new companies." Such statement is untrue.

It is improper for the Government to refer (Brief, page 15) to judgments against other defendants in severed causes, particularly when the accuracy of the statements may not be verified from this record.

The Government asserts (Brief, page 21) "* * * As was well known to the district court, in the interim appellant and the RKO defendants had repeatedly manifested considerable reluctance to effectuate the divorcement contemplated by the 1948 decree. * * *" Such statement is untrue. Prior to the order appealed from, appellant had never taken part in any proceeding in the District Court except to give his consent to Section V of the consent decree and to point out in connection with certain applications by RKO that he could not trustee his stock in either of the new companies until such new company should be formed.

The Government asserts (Brief, page 26, footnote 13) "Appellant was not a defendant in the original proceedings, for the simple reason that he acquired his holding subse-

quent to the commencement of the litigation. * * *" The Government failed to inform the Court that neither appellant's predecessor in title nor any other stockholder was a party to the proceedings.

The Government asserts (Brief, page 27) "* * * It was well known to the district court that appellant and RKO had sought numerous extensions and modifications between the time of entry of the decree and the date appellee brought on its motion to establish a time limit for final disposition of the stock (statement, *supra*, pp. 7-9)." Such statement is not true. Appellant Howard Hughes has never sought any extension or modification of any decree herein and neither is there any evidence of any "course of conduct" by appellant as is referred to on page 27.

Prior to the entry of the consent decree the mandate of this court (R. 169) called for a new trial with respect to certain issues, including the remedy of divorcement sought by the Government. There was not at the time of the entry of the consent decree, nor at any time since has there been, any evidence before the District Court upon which it could grant any relief against appellant or RKO with respect to divorcement. The consent decree (R. 170) expressly provided that it should not constitute evidence of any violation of the anti-trust laws and it contained no adjudication of any kind except that certain carefully specified injunctions should be issued as agreed upon. The Government does not allege or claim that the consent decree was in any way ambiguous.

The fallacy of the Government's argument is this. It assumes by a short cut, and in the absence of any such recitation in the decree itself, that the parties are bound by some "purpose" which goes beyond the carefully specified provisions therein contained. It then builds upon this false foundation a second false argument that it was within the power of the District Court, without hearing evidence upon the subject, to alter the express provisions and

guaranteed rights voluntarily subscribed by the parties and the Court upon mere unsupported motion by the Government.

The Government argues that the voting trust as it is written might continue indefinitely. Appellant consented to the terms as written. It would be contrary to law and good sense now to torture the terms of the trust agreement which the Government asked appellant to sign into a forfeiture of his stock which he never agreed to because of the Government's later thinking upon that subject. At least there should be some evidence on the subject.

Respectfully submitted,

T. A. SLACK,
Attorney for Appellant,
Howard R. Hughes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 86.

HOWARD R. HUGHES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Acknowledgment of Service.

Due service according to the rules of the Supreme Court of five copies of the within Reply Brief of Appellant is hereby acknowledged.

Dated this 4th day of January, 1952.

Attorney for Appellee.



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In the Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

HOWARD HUGHES, *Appellant*,

v.

THE UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Southern District of New York.

MOTION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., *Defendants*

MOTION TO AFFIRM

Pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court, appellee United States of America moves that the order of the district court be affirmed.

In 1938 the United States brought a civil proceeding under Section 4 of the Sherman Act against the eight leading distributors of motion picture films. Radio-Keith-Orpheum Corporation and certain of its subsidiaries, which will be collectively referred to as RKO, were defendants in this proceeding. Appellant was not a defendant but on November 8, 1948, when a consent decree was entered against RKO, he was its dominant stock-

holder and he consented to, and agreed to become bound by the terms of, Section V of the decree. The present appeal is from an order of the district court fixing certain terms and conditions of a trust agreement provided for, and established pursuant to, Section V.

The proceedings in this case (generally known as the *Paramount* case) have been protracted and have twice come before this Court.[1] A consent decree entered in 1940 ran for a trial period of three years. Thereafter, following trial of all issues in the case, the district court on December 31, 1946, entered a final judgment against the defendants. 70 F. Supp. 53. On appeal therefrom, this Court affirmed in part and reversed in part, and remanded the case to the district court for further proceedings. 334 U.S. 131.

Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO agreed upon a final settlement of these issues as between themselves and submitted to the district court a consent decree which was entered on November 8, 1948. The decree provided, *inter alia*, for divorcing RKO's exhibition business from its production and distribution business. Such divorcement was to be carried out within a year from the date of the decree, by turning over RKO's exhibition business to a new theatre company and its production and distribution business

[1] There have also been several appeals to this Court from orders denying leave to intervene. *St. Louis Amusement Co. v. United States*, 326 U.S. 680; *Ball, Trustee v. United States*, 338 U.S. 802; *Partmar Corp. v. United States*, 338 U.S. 804; *Sutphen Estates, Inc. v. United States*, No. 668, this Term.

to a new picture company, with the stock of these new companies going to RKO's stockholders in proportion to their holdings of RKO stock.

Appellant was RKO's dominant and controlling stockholder at the time the consent decree was entered.[2] The divorcement provided for in the decree obviously would have been nominal rather than real if appellant had continued as the dominant stockholder of each of the two new companies to be created by RKO. Section V of the decree, which was designed to prevent this, thus was an essential element of the decree. It provides that within one year from the date of the decree the appellant shall either (a) dispose of all of his stockholdings of one of the new companies or (b) deposit all of his stock in one of these companies under a trust agreement to remain in force until appellant should have sold all of his stock in one of the new companies. It provides that the trustee shall exercise all voting rights of the trusteed stock, and it further provides: "Such trust shall be upon such other terms or conditions, including the compensation to the trustee, as shall be prescribed by the Court."

RKO did not effect divorcement within the year's time provided for in the decree. On RKO's

[2] He owned 24% of RKO's stock and no other stockholder owned as much as 1% of its stock. His control of RKO was conceded by his counsel in the hearing on the order now being appealed. Counsel stated that "it was his [appellant's] influence that caused RKO to go down and enter into this agreement with the Government and agree to settle this litigation. It was * * * the new stock control that enabled the Government to do this very thing in the first place." (Tr. of Hearing of February 15, 1951, pp. 24-25.)

request, and with the Government's consent, the court granted RKO an additional six months to effect divorcement. Subsequently RKO filed a motion, to which appellant consented, to modify the consent decree by extending the time for divorcement for a further period of three years. The Government, in opposing this motion, contended that neither RKO nor appellant had made any effort to comply with the divorcement provisions of the judgment.[3] The district court did not grant the extension sought by RKO but did enlarge the time for completing divorcement to December 31, 1950. As a result of these enlargements of the time for divorcement, appellant's obligation under Section V, to sell his stockholdings in one of RKO's successor companies within a year from the decree or deposit the stock of one of the companies with a trustee pending sale thereof, was extended from November 8, 1949, to December 31, 1950.

The trust provided for by Section V of the decree was set up by an order of the district court entered on December 28, 1950, approving a stipulation between the appellant and the Government filed with the court on the same day. The order appoints a trustee to hold appellant's stock in the new theatre company and fixes certain terms and conditions of the trusteeship. The stipulation sets

---

[3] A consent decree entered against Paramount Pictures, Inc., on March 3, 1949, provided for divorcing Paramount's exhibition business from its production and distribution business by turning over the former to a new theatre company and the latter to a new picture company. Although Paramount's assets were considerably greater than RKO's, Paramount completed the required divorcement in approximately nine months.

forth that it is the understanding of the parties that the Government will file a motion during January 1951 asking for entry of an order establishing as one of the terms of the trusteeship that, if appellant shall not have not sold the trusteed stock within a year from the date of the court's order, the trustee shall sell this stock under the terms and conditions to be established by the court. The stipulation also sets forth that appellant will contest such motion.

On January 15, 1951, the United States filed the motion contemplated by the stipulation. After argument of the motion on February 15 and February 21, 1951, and after the filing of supporting and opposing briefs and affidavits, the district court on March 24, 1951, entered the order from which the present appeal is taken. The order amends the order of December 28, 1950, appointing a trustee by providing that, if appellant shall not have disposed of the trusteed stock by February 20, 1953, the trustee shall dispose of this stock by February 20, 1955. The order provides that the trustee shall submit for the approval of the court, upon notice to the parties, any proposed disposition of this stock. The order also provides that the stock shall be disposed of "so far as possible without sacrifice to the beneficial owner."

The gravamen of appellant's attack upon the order of March 24, 1951, as set forth in his jurisdictional statement, is that the order amends the consent decree, and that adequate grounds for the amendment have not been shown. We submit that the attack rests upon a misinterpretation of the court's order. The order does not amend the consent decree. It is an exercise of the authority ex-

pressly conferred by Section V of the decree, to establish the terms and conditions of the trust agreement provided for in Section V.

The district court clearly did not abuse its discretion in determining that it was appropriate and necessary to include in the terms and conditions of the trust agreement time limitations on disposition of the trusteed stock. The district court knew that RKO had succeeded in delaying divorcement for nearly 14 months beyond the period fixed by the consent decree and that it had sought to delay divorcement by three and a half years beyond this period. Certainly in these circumstances the district court might reasonably determine that the interim trusteeship set up by Section V pending disposition of appellant's stock interest in one of RKO's successor companies should not continue indefinitely but that there should be a sale of such stock and an end to the trust within six years and some three months after entry of the consent decree.[4] During the hearing in the district court there was the following pertinent colloquy:[5]

> JUDGE HAND: Well, you are claiming the most extreme interpretation of that agreement, which really is that he does not have to do anything ever.
>
> MR. SLACK [appellant's counsel]: I think that is what it says.
>
> JUDGE HAND: That he does not have to do anything ever; that he can say, "Well, I like

[4] The consent decree was entered on November 8, 1948. The order of March 24, 1951, requires sale of the trusteed stock by February 20, 1955.

[5] Tr. of hearing of February 15, 1951, p. 27.

this stock; it is good enough for me; I can't vote it, to be sure, but that is good enough for me. It is a very pleasant situation I am in, and I am getting the income from it"—whether it is good or bad, I don't know—"And I am going to stick to that."

There is certainly a remedy against that.

Appellant has stock control of the new picture company.[6] At the same time he is equitable owner of 24% of the stock of the new theatre company and entitled to dividends declared on such stock. There is therefore powerful inducement to utilize his control of the new picture company to cause it to grant the new theatre company preferences and competitive advantages denied to others, in other words, to continue to operate on the basis of a vertically integrated enterprise notwithstanding the district court's condemnation of vertical integration in the case of other defendants in the *Paramount* case. Following remand and after consent decrees which provided for divorcement had been entered against RKO and Paramount, the district court held that adequate relief against further violation of the Sherman Act required divorcement of the theatre interests of the three remaining inte-

[6] At the hearing in the district court appellant made no attempt to show that there had been any change since entry of the consent decree with respect to his stock control of RKO. And the Government's brief in the district court pointed out that in recent years three of RKO's seven directors have been direct representatives of appellant. He himself was a director, his counsel (T. A. Slack) was another, and a third was Noah S. Dietrich, who is executive vice president of the Hughes Tool Company of which appellant is president.

grated defendants (Fox, Loew and Warner). *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881, 893-896, affirmed per curiam, 339 U.S. 974. The district court found: "The vertical integrations aided * * * at every point" defendants' "horizontal conspiracy as to price-fixing, runs and clearances" (85 F. Supp. 894). It concluded that it would not be justified in leaving those who had participated in improper practices "free to continue them except for [the] inadequate injunctive provisions" and that "the divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly power on the part of the remaining defendants" (*id.*, p. 896).

Appellant's jurisdictional statement points to the language in Section V that the trust therein provided for shall remain in force until "Howard R. Hughes" shall have sold his stockholdings in one or the other of RKO's successor companies. Appellant suggests that when Section V provides that the court may prescribe "other" terms or conditions of the trust, this does not authorize the prescription of any term or condition under which anything other than a sale by Howard R. Hughes might bring the trust to an end. We submit, however, that Section V implicitly obligates appellant to make a prompt sale and that the terms or conditions of the trust which the court is authorized to prescribe may provide that when appellant is in default in this obligation, it devolves upon the trustee. The court's order of March 24, 1951, does not modify the duration of the trust as set forth in Sec-

tion V. Under that order the trust remains in force until a sale by appellant or, if he has not sold by February 20, 1953, until a sale by the trustee on his behalf.

But even if the order of March 24, 1951, should be regarded as amendatory of Section V, we submit that authority for the order is conferred by Section VIII, B, of the decree. This section provides:

> B. *Jurisdiction* of this cause *is retained for the purpose of enabling any of the parties* to this consent decree to *apply to the Court* at any time *for such orders or direction as may be necessary or appropriate for the* construction, *modification* or carrying out *of the same*, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief. [Emphasis supplied.]

Appellant's contention in effect asks the Court to qualify the broad general language of the decree with respect to modification by adding thereto the limitation that there shall be no modification of its provisions in the absence of "a showing of changed conditions which were unforeseen at the time of the decree." We submit, therefore, that the party seeking modification of the decree is the appellant, not the Government.

In any event, there have been changes in circumstances and conditions subsequent to entry of the decree which clearly warrant entry of this order. As we have previously stated, Section V constitutes an essential element of the divorcement required by the decree. By the terms of the decree

such divorcement was to be completed by November 8, 1949. But by virtue of RKO's subsequent requests and representations divorcement was not effected within the time fixed by the decree. It was not only postponed to December 31, 1950, but if RKO and appellant had fully prevailed in their requests, it would have been postponed to November 8, 1953. The related obligations imposed on the appellant by Section V have been correspondingly postponed. This constitutes a material change in circumstance occurring since entry of the decree.

There were other new and material circumstances occurring subsequent to the consent decree. After such decree, Paramount entered into a consent decree and effected divorcement thereunder. After such decree, the district court determined, as to the three remaining integrated defendants in the *Paramount* case, that adequate relief against further violation of the anti-trust laws required divorcement of their theatre interests. The interpretation which appellant places upon Section V may be regarded as another new circumstance. In the present proceeding appellant's position was that the trust agreement provided for in Section V is not a merely interim arrangement to permit orderly liquidation of his stock interest in one of the successor companies, but constitutes a sanctuary for indefinite continuation of his ownership of all of his stock in the new theatre company while continuing to retain all of his stock in the new picture company.

We submit that these new circumstances clearly warranted the court in setting an outer time limit

for final disposition of the trusteed stock. And the time limit actually fixed by the court, which runs to more than six years from the date of the entry of the consent decree, certainly is, by any test which might be applied, reasonable and fair to the appellant.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the order of the district court of March 24, 1951 should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

May 1951.

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Brief for the U.S.

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No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1951

HOWARD HUGHES, APPELLANT

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 86

HOWARD HUGHES, APPELLANT

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THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not render an opinion in conjunction with its order granting appellee's motion, here appealed from. Two prior opinions of the district court in the antecedent proceedings are reported in 66 F. Supp. 323 (reversed in part and affirmed in part, 334 U. S. 131), and 85 F. Supp. 881 (affirmed *per curiam*, 339 U. S. 974).

JURISDICTION

The three-judge district court entered its order on March 24, 1951 (R. 211). The petition for appeal was filed and allowed on April 19, 1951

(R. 211). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. Code 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 15 U. S. C., Supp. IV, 29. On October 8, 1951, this Court noted probable jurisdiction (R. 269).

QUESTIONS PRESENTED

1. Whether the district court properly construed Section V of the consent judgment entered against the RKO defendants and appellant as conferring upon the court the right to direct a trustee to sell appellant's stock in RKO Theatres Corporation within a prescribed time.

2. Whether, in any event, the order of the district court was a proper exercise of its power, either under provisions of the judgment reserving to the court the right to amend the judgment or under its equity powers, to amend Section V of the judgment in order to effectuate its basic purpose.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 4, known as the Sherman Act, provides in part as follows:

> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several dis-

trict attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

In 1938 the United States brought a civil proceeding under Section 4 of the Sherman Act against the eight leading distributors of motion picture films. Five of them were integrated companies having large motion picture theatre interests. One of these five was Radio-Keith-Orpheum Corporation and certain of its subsidiaries, which will be referred to as RKO. Appellant was not a defendant but in 1947 he acquired approximately 24% of the stock of RKO (R. 171, 249). On November 8, 1948, when a consent judgment was entered against RKO (R. 170–188), he was its dominant stockholder, and he consented to and agreed to become bound by the terms of Section V of the decree (R. 185–186). The present appeal is from an order of the district court fixing certain terms and conditions of a trust agreement provided for and established pursuant to Section V.

The proceedings in this case (generally known as the *Paramount* case) have been protracted and have twice come before this Court.[1] A consent

[1] There have also been several appeals to this Court from orders denying leave to intervene. *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Ball, Trustee* v. *United*

decree entered in 1940 ran for a trial period of three years. Thereafter, following trial of all issues in the case, a special expediting court consisting of three judges, sitting as a district court, entered findings of fact and a judgment against all of the defendants, including RKO. The judgment did not provide for divorcement of the exhibition business from the distribution business of the integrated defendants. All the defendants appealed from this judgment, and the Government appealed on the ground of inadequacy of relief. This Court affirmed in part and reversed in part and remanded the case to the district court for further proceedings, including determination of what, if any, divorcement relief should be decreed. 334 U. S. 131.

Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO agreed upon a final settlement of these issues and submitted a decree to the district court, which included both the provisions in the earlier decree which had been affirmed by this Court and additional provisions agreed upon by the parties. This decree (R. 170–188), entered by the district court on November 8, 1948, provided, *inter alia*, for divorcing RKO's exhibition business from its production and distribution business.

States, 338 U. S. 892; *Partmar Corp.* v. *United States*, 338 U. S. 804; *Sutphen Estates, Inc.* v. *United States*, No. 25, this Term.

The judgment recited that the RKO defendants represented to the plaintiff that their plan of reorganization would effect divorcement (R. 171). Such divorcement was to be carried out within a year from the date of the decree by turning over RKO's exhibition business to a new theatre company and its production and distribution business to a new picture company, with the stock of these new companies going to RKO's stockholders in proportion to their holdings of RKO stock. Appellant owned 24% of RKO's stock and no other stockholder owned as much as 1% (R. 171). Section V of the judgment provided for disposition of appellant's stock in one or the other new companies within a year from the date of the judgment, and gave him the option of selling the stock himself or turning it over to a trustee who shall be entitled to vote the stock. Section V then provides (R. 186):

> Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the

> Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

Section VI of the judgment provides that during the period required for RKO to complete its reorganization, which in any event should occur within one year from the date of the entry of the judgment, nothing in the judgment should prevent RKO from favoring its theatres in the licensing of RKO pictures (R. 186).

The judgment also contained the standard provision (Section VIII B, R. 188):

> Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same; for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

After further proceedings against the remaining defendants, the district court on February 8, 1950 entered a judgment against all the other defendants except Paramount, against whom a judgment somewhat similar to that of RKO had been entered on March 3, 1949. Divorcement on the part of all integrated defendants was required by these judgments. The judgment of February

8, 1950, was affirmed by this Court in 339 U. S. 974; 340 U. S. 857.

RKO did not effect divorcement within the year's time provided for in the decree. Prior to the end of the year (November 8, 1949), RKO sought the Government's consent to a one year extension. The Government was unwilling to consent to more than a six months' extension, and then only on two conditions. One was that there would be no extension of Section VI of the decree. The second condition was that appellant would agree that he would not petition for a further extension of time under Section V. These conditions were accepted (R. 242, 247–248).

RKO, having obtained this extension to March 15, 1950, brought before the district court in February 1950 several motions[2] which sought not only to modify the judgment by extending the time for divorcement to February 8, 1953,[3] but also other substantial modifications in the decree.[4] Among other things RKO, despite the condition imposed by the Government for its consent to a six months' extension, moved to reinstate Section

[2] These motions are not part of the printed record but are on file with the Court.

[3] Since defendants had already had 18 months within which to divorce, if their application had been granted, they would have obtained a period of 4½ years to effect divorcement instead of the one year provided for in the judgment.

[4] The proposed modifications included giving RKO the right to dispose of theatres to other defendants, which the original judgment prohibited.

VI until 1953. These motions were made without having obtained approval thereof by RKO's stockholders, although the plan of reorganization presented to and adopted by the stockholders had called for divorcement by the end of one year from the date of judgment (R. 244–245).[5] One of RKO's motions also sought to extend to February 8, 1953, the time within which appellant Hughes should dispose of his stock in one of RKO's successor companies pursuant to Section V of the judgment. Appellant expressly consented to that request for extension and his counsel was present at the hearing thereon (R. 242).

The district court extended RKO's and appellant's time to effect divorcement until the end of 1950 (Tr., April 19, 1950, p. 81). Prior to that time appellant filed with the district court his election to retain his stock in the new picture company. Shortly before the end of the year, appellant's counsel approached the Government to secure agreement to the terms of a proposed trusteeship for appellant's stock in the new theatre company (Tr., February 15, 1951, pp. 30–32). The Government insisted that one term of the trusteeship should be the sale of the stock by the trustee if appellant did not sell the stock within a specified period, but appellant was unwilling to have such a term included (*ibid*). In order to en-

[5] A number of stockholders who desired an early divorcement were heard by the district court in opposition to the motions.

able appellant to meet his deadline and to present to the district court the terms which were agreeable to both parties, the parties signed and presented to the court a stipulation containing the agreed terms, as well as the statement that it was the understanding of the parties that the Government would file a motion during January 1951 asking for entry of an order establishing as one of the terms of the trusteeship that, if appellant should not have sold the trusteed stock within a year from the date of the court's order, the trustee should sell the stock under terms and conditions to be established by the court (R. 199–200). The stipulation also noted that appellant would contest such motion (R. 200). On December 28, 1950, the district court entered an order appointing a trustee in accordance with the stipulation filed with it (R. 200).

On January 15, 1951, the United States filed the motion contemplated by the stipulation (R. 200). After argument of the motion on February 15 and February 21, 1951, and after filing of supporting and opposing briefs and affidavits, the district court on March 24, 1951, entered the order from which the present appeal is taken (R. 211). The order amends the order of December 28, 1950, appointing a trustee, by providing that, if appellant shall not have disposed of the trusteed stock by February 20, 1953, the trustee shall dispose of this stock by February 20, 1955 (R. 211). The order further provides that the trustee shall

submit for the approval of the court, upon notice to the parties, any proposed disposition of this stock (*ibid.*).

SUMMARY OF ARGUMENT

I

The basic purpose of the RKO consent decree was divorcement—the creation of a new picture company and a new theatre company, wholly independent of one another. According to the terms of the decree, this was to be accomplished within a year.

Section V is an integral part of that decree. It provided that, within the year, appellant, the dominant stockholder in RKO, would dispose of his stock in one of the new companies. He was either to sell such stock or to place it in a voting trust. The latter alternative enabled appellant to avoid the loss and hardship which might result from an immediate, forced sale of stock of a newly created corporation.

Appellant now contends that, having elected to trustee his theatre company stock, he has no further obligation to sell. He points out that the trust states that it shall continue "until [appellant] shall have sold" the trusteed stock, and argues that this means that, unless he elects to sell, the trust is to continue indefinitely. He would accordingly exclude from the scope of the broad provision that the court may prescribe "other terms and conditions" all power to pre-

scribe a reasonable time limit for consummation of a sale.

Such a construction would enable appellant, at his pleasure, to frustrate the primary purpose of the decree—divorcement of the economic interests of the two companies. It would also place upon the antitrust court the anomalous and burdensome duty of supervising a trust which might last for an indefinite period and which, if there is no implied requirement of sale, contains no provision for ultimate disposition of the *res*.

We submit that the language, as well as the related circumstances, indicates that appellant was required, in all events, to sell within a reasonable time. The absence of any other provision for termination makes this the only permissible construction. This was not a trust to continue for a specific period *unless* appellant should sooner elect to sell, but a trust to continue "*until* [appellant] shall have sold" (italics supplied).

The decree grants the courts specific authority to prescribe "other terms and conditions" of the trust. This includes the power to set a reasonable terminal date, by directing the trustee to sell the stock unless appellant should have done so within a specific reasonable time. Such a condition is in harmony with the purpose of the decree and is not inconsistent with any of its provisions. The time actually set for final disposition—more than six years from the date of the original decree—is fair by any test.

II

Even if the court's order be deemed amendatory of the decree—and not merely an order prescribing the terms of the trust, as authorized by the original decree—it was within the authority of the court. The power to modify has two independently sufficient bases: (1) The provisions of the decree reserving jurisdiction to amend; and (2) the inherent equity powers of the court. There can be no real question here that the court's order was wholly consistent with the underlying purpose of the original decree and was, indeed, necessary to insure its fulfillment. Accordingly, the test enunciated by this Court in *Chrysler Corporation* v. *United States*, 316 U. S. 556, is fully satisfied. Moreover, if a showing of changed circumstances should be deemed an additional requisite, appellant's unwillingness to dispose of the stock and his interpretation of the judgment as not requiring him to do so constitute unanticipated developments, occurring subsequent to the entry of judgment, fully warranting a modification. Where, as in this litigation, a decree is framed with a view to the future effectuation of a complex plan of reorganization, it is of particular importance that the court be permitted to take ancillary action calculated to prevent a recalcitrant party from subverting the objectives of the plan.

ARGUMENT

I

THE ORDER APPEALED FROM WAS PROPERLY MADE PURSUANT TO SECTION V OF THE JUDGMENT

As the parties and the district court have recognized, the primary relief provided for in the RKO judgment is divorcement. Section V of the judgment, which relates to the disposition of the stock of the controlling stockholder, was an integral part of the divorcement relief. That section provided for the disposition by appellant himself of his stock in the new picture or theatre company, a year from the date of the judgment, or turning the stock over to a trustee within that time. It was also expressly provided that in the event the stock were trusteed certain terms were to attach to the trust, and that the trust "should be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court." The terms set out in Section V were (1) granting voting rights to the trustee, (2) granting appellant the right to terminate the trust by selling the stock, and (3) giving the appellant the right to receive the dividends on the trusteed stock "and proceeds from the sale thereof."

Appellant does not deny that the district court could provide for terms implementing the trust, within the framework of the provisions, purposes and limitations of Section V of the decree (Br., p. 9). He contends, however, (1) that he had an option to sell his stock in one of the newly

created companies or to place his holdings in one of those companies in a voting trust; and (2) that his election to place his theatre company stock in trusteeship precludes the court from ordering a sale of this stock. In support of the latter proposition, appellant relies upon the language of Section V which declares that the voting trust shall "remain in force until Howard R. Hughes shall have sold" his interest in the trusteed stock.

It is the Government's position that appellant was, indeed, given an option, but only an option to sell the stock of one of the two new companies within a specified period (one year from the date of judgment) or to place it in a voting trust for an interim period, under the supervision of the court, pending the final effectuation of a sale; that the language "until Howard R. Hughes shall have sold," read in the context of the decree and the litigation which gave rise to it, plainly imports an affirmative duty to sell with reasonable promptitude; and that, after appellant had manifested reluctance to sell, the court was fully empowered, pursuant to the language authorizing it to fix "terms and conditions," to provide that if he did not live up to his obligation by selling his interest prior to February 20, 1953, the trustee should effectuate the sale on his behalf within two years thereafter.

Appellant's construction of the judgment would permit him to retain the beneficial ownership of both corporations. He would have it that the duration of the court-created trust must be left to

his exclusive discretion and that he may, at his pleasure, prevent divorcement of his picture interests and his theatre interests. As Judge Hand remarked, "There is certainly a remedy against that" (R. 252).

A judgment must be construed as a whole and in the light of the "issues it was meant to decide." *Vicksburg* v. *Henson*, 231 U. S. 259, 269; *Felker* v. *Southern Trust Co.*, 264 Fed. 798 (C. A. 8), certiorari denied, 254 U. S. 633; *Hendrie* v. *Lowmaster*, 152 F. 2d 83 (C. A. 6). "Whatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute." *Union Pacific R. R.* v. *Mason City &c. R. R.*, 222 U. S. 237, 247. As the parties here and the district court have repeatedly recognized, the primary relief provided for in the RKO judgment is divorcement.[6] Section V of the judgment, which relates to the disposition of the stock of the controlling stockholder, is an integral part of the decree and must be construed accordingly.

Examination of the RKO judgment reveals that it was carefully drawn to insure that the two newly created corporations would be operated

[6] Judgments against other defendant companies in this case also provide for divorcement as between the picture business and the theatre business of each. In addition, the judgments contain provisions limiting the possibilities of common stock ownership of the divorced enterprises. These limitations are directed specifically at large stockholders. See C. C. H. Trade Cases (1948–1949), par. 62,377, pp. 63,026–30. C. C. H. Trade Regulations Reporter (1948–1951), par. 62,765, pp. 64,273–74.

wholly independently of one another. See Sections II B, III E, IV–V, VI B, (R. 173–4, 185–7). Appellant is undeniably the dominant stockholder in the new picture company. If he were to retain his equitable ownership in the theatre company stock, which entitles him to the dividends thereon,[7] he would have a powerful inducement to utilize his control of the picture company to cause it to grant the new theatre company preferences and competitive advantages denied to others—in other words, to continue to operate on the basis of a vertically integrated enterprise, notwithstanding the district court's condemnation of vertical integration in the case of other defendants in the *Paramount* case.

Clearly, the court never intended that appellant could subvert the aim of divorcement by the simple expedient of continued inaction. As Judge Goddard pointed out, "Don't you see if he [appellant] is allowed to keep the stock he is doing just what we intended to prevent; he is enjoying the profits of the two corporations" (R. 265). Referring to the language that the trust would continue "until Howard R. Hughes shall have sold," Judge Coxe commented (R. 250):

> Well, it did contemplate that Mr. Hughes was going to sell his stock. That language, as I read it, certainly makes that fairly clear.

[7] Appellant receives "all dividends and other distributions" on the theatre company stock while the trust lasts (R. 186).

That Judge Hand did not interpret the decree to permit appellant to hold the stock indefinitely appears from the following colloquy (R. 252):

> Judge Hand: Well, you are claiming the most extreme interpretation of that agreement, which really is that he does not have to do anything ever.
>
> Mr. Slack: I think that is what it says.
>
> Judge Hand: That he does not have to do anything ever; that he can say, "Well, I like this stock; it is good enough for me; I can't vote it, to be sure, but that is good enough for me. It is a very pleasant situation I am in, and I am getting the income from it"—whether it is good or bad, I don't know—"And I am going to stick to that."
>
> There is certainly a remedy against that.

Appellant states that he entertained a different understanding. However that may be, the language in question is part of the judgment of the court, and the court's interpretation of its judgment, unless inherently unreasonable, should be decisive. As this Court has stated on numerous occasions, a consent decree is a judgment and not a mere contract. *United States* v. *Swift & Co.*, 286 U. S. 106, 115; *Pope* v. *United States*, 323 U. S. 1, 12. See also pp. 25–26, *infra*. Its construction is accordingly a matter peculiarly within the competence of the court. That would seem to be especially true where, as here, the district court

has had long familiarity with the litigation which formed the matrix of the judgment.[8]

It will be noted that Section V provides generally for judicial supervision of the trust. The court is to prescribe appropriate "terms and conditions." Certainly it will not be seriously suggested that the antitrust court contemplated the continuing supervision of a trust for an indefinite period. On appellant's theory, however, the trust could continue, in Mr. Hughes' discretion, for Mr. Hughes' lifetime, or, for aught that appears from appellant's brief, beyond that. Appellant does not indicate what, in his view, would occur if he failed to effectuate a sale at any time during his lifetime—whether the trust would then continue in perpetuity; whether the court might, at the time of appellant's death, order a sale, notwithstanding Hughes' lack of prior action; or whether the property would descend, free of trust, to Hughes' heirs (a result which would further frustrate divorcement in the event that the same heirs inherited the picture company stock held by appellant). It is unnecessary to explore all possible consequences of appellant's interpretation of Section V; merely to state some of the more obvious

[8] While the 1948 judgment which lies at the root of this case is denominated a consent decree, it is to be noted that it was decreed after a trial, a judgment by the trial court, an affirmance by this Court of many provisions of that judgment (which provisions were incorporated in the 1948 decree), and an admonition by this Court as to the principles to be followed by the district court in respect of other matters.

is to demonstrate that his interpretation is as inconsistent with the functions of an antitrust court as it is incompatible with the purposes of the decree.

There is, of course, a perfectly reasonable interpretation of the function which the voting trust was to serve. If appellant had been directed by the decree to sell his stock in one of the new companies within a year of the judgment (Section V, par. A) and given no alternative, the result might have been to compel a sale at serious economic sacrifice.[9] Accordingly, it was provided that appellant, having decided whether to keep picture company stock or theatre company stock, might place the stock of the other company in a voting trust until it was sold. But a sale was in all events to be effected. Indeed, that conclusion follows from the language used, even apart from the surrounding circumstances. Section V did not provide that the voting trust was to last for a term of years, for Hughes' lifetime, or for any other ascertainable period. The only reasonable explanation is that appellant was to take prompt action to terminate it. Appellant would interpret the decree as if it declared that the trust would continue in force for Hughes' lifetime (or beyond) *unless* Hughes should sooner elect to sell. The decree, however, does not say "unless," but "until"; not "elects to sell" but

[9] Under the terms of the judgment it might be a year before the new companies were formed.

"shall have sold." The trust "shall thereafter remain in force," the decree reads, "*until* Howard R. Hughes *shall have sold* * * *." The obligation to sell within some reasonable time is clear.[10] That the lower court so interpreted the decree appears from the statements quoted at pages 16–17, *supra*.

But whether or not the decree imposed any such *obligation*, it certainly need not be construed, contrary to its purpose, as giving appellant *carte blanche* to retain the stock forever. Any doubt as to the court's authority to implement the decree so as to avoid such a result would be resolved by the provision in Section V (R. 186) that—

> Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court.

The "other"-terms which the court may prescribe certainly would include terms intended to clarify the original decree in order that it might accomplish its principal purpose. We are not confronted with a situation in which the new term or condition is inconsistent with the provisions of the trust specified in the decree. The

[10] It is of interest to note that even in cases where a settlor has expressly prohibited sale of the trust *res*, the chancery power has been held sufficiently broad to permit the court to override his intention in special circumstances. 3 Bogert Trusts § 742. In the instant case, not only was sale contemplated; the court was granted general authority to prescribe the "terms and conditions" of the trust.

decree did not undertake to spell out in any detail the governing conditions, but gave the court plenary power to prescribe them. The establishment of a terminal date for disposition of the *res* is covered by this broad delegation of authority. There is no conflict whatever between the express provision for termination on sale by appellant, which assumes that appellant will sell within a reasonable time, and the imposition of a condition designed to fill in the gap as to the termination date in the event that appellant fails to act.

Appellee filed its motion seeking a time limitation in January 1951, more than two years after the decree had been entered. As was well known to the district court, in the interim appellant and the RKO defendants had repeatedly manifested considerable reluctance to effectuate the divorcement contemplated by the 1948 decree. (See Statement, *supra*, pp. 7–9.) Moreover, at the hearing on the motion, appellant argued for a construction "that he does not have to do anything ever" (R. 252). In the light of these circumstances, we believe that the court was not merely authorized to fix a terminal date, pursuant to its power to prescribe terms and conditions, but that it was incumbent upon it to do so. The outer time limit actually set by the court's order, February 20, 1955, is more than six years removed from the date of the original decree. By any test, the order must be deemed a reasonable

exercise of the power conferred upon the court, and the result eminently fair to the appellant.

II

In Any Event, the District Court Had Power To Modify the Judgment in Order To Effectuate Its Basic Purpose

In appellee's view, the order of the district court did not modify or amend the consent decree, but prescribed a term of the trust as authorized by the language of the decree. If, however, it be assumed, *arguendo*, that the court's action was tantamount to an amendment, such amendment, it is submitted, was fully within the power of the court.[11]

Section VIII B, which applies to all portions of the decree, provides (R. 188):

> Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for

[11] In this case, RKO obtained two modifications (the second over the Government's objection) permitting it additional time to divorce its picture and theatre activities. Still other amendments have been effectuated by consent. Decrees against the other motion picture defendants have also been amended on frequent occasion. The trial of the *Paramount* case was initiated by a motion to amend a consent judgment of 1940 (R. 128). In the district court, as well as in this Court, the defendants, including RKO, unsuccessfully contended that parts of that judgment could be set aside only by evidence and for cause.

> the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

In numerous antitrust cases, this Court has pointed out that the reservation of jurisdiction enables the district court "to take the necessary measures to cause the decree to be fully and faithfully carried out," *e. g., Associated Press* v. *United States,* 326 U. S. 1, 22–23; *Lorain Journal* v. *United States,* No. 26, this Term. It has been held that, even in the absence of specific language, an equity court has the inherent power, in appropriate circumstances, to modify its decree. *United States* v. *Swift & Co.,* 286 U. S. 106, 114; *Ladner* v. *Siegel,* 298 Pa. 487, 497; 148 Atl. 699, 702 (1930). Appellant does not appear to contest this point, but argues (Br., p. 8) that the Government failed to make a showing of good cause.

The Government does not, of course, contend that the power to modify a consent judgment is unlimited. As stated by this Court in *Chrysler Corporation* v. *United States,* 316 U. S. 556, 562, "the test to be applied * * * is whether the change served to effectuate or thwart the basic purpose of the original consent decree [citing *United States* v. *Swift & Co.,* 286 U. S. 106]." In the *Chrysler* case, a consent judgment entered in November 1938 provided that a prohibition

against affiliation with any finance company would expire on January 1, 1941, unless by that date the Government had obtained similar relief as against General Motors, as the result of contemplated civil proceedings against that corporation. When it developed that the General Motors proceedings would not be finally determined by the 1941 date, the Government sought a modification of the Chrysler decree which would extend the time limitation to January 1, 1943. The district court found that the basic purpose of the decree was that Chrysler's rights would ultimately be determined by the outcome of the General Motors proceedings, and that the purpose of the time limitation was to safeguard Chrysler against undue delay on the part of the Government. The court, finding further that the Government had used due diligence in the conduct of the General Motors litigation and that an extension of time would not seriously prejudice Chrysler, changed the date as requested. Holding that the district court's findings were reasonable and that the modification would effectuate the decree's basic purpose, this Court affirmed.

Appellant points out (Br., pp. 16–17) that in the later case of *Ford Motor Company* v. *United States*, 335 U. S. 303, this Court refused to approve a modification in the parallel Ford decree. As the opinion in the *Ford* case discloses, however, the difference in result rests squarely upon a difference in the circumstances and does not

vitiate the principles enunciated in the *Chrysler* decision. The opinion points out (p. 320) that the extension in question was the sixth such extension sought by the Government; that "what was at the time of the *Chrysler* decision a two-year delay * * * has now stretched into a ten-year delay" (p. 321); and that "circumstances that were found extenuating * * * two years after the entry of the decree are hardly compelling ten years afterward" (*ibid.*).[12] The Court further found that Ford was being subjected to a prejudicial competitive disadvantage (pp. 321–2).

Appellant's brief also emphasizes that Justice Frankfurter, who dissented in the *Chrysler* case, wrote the majority opinion in *Ford*. But appellant fails to note that Justice Frankfurter stated in his dissent in the former case (316 U. S. at 567):

> Of course, the District Court had the power to modify the consent decree in order to

[12] Appellant also seeks comfort in *United States* v. *International Harvester Co.*, 274 U. S. 693, and *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. Del.). In each of those cases, however, the modification sought was denied because it was found inconsistent with the basic purpose of the original decree. In the *Harvester* case, the Court found that competitive conditions had been achieved as a result of the original decree and therefore found it unnecessary to amend. In the *Radio Corporation* case, the application to vacate the decree rested entirely upon the Government's unsupported assertion that the public interest required such action.

> effectuate its basic purposes. The fact that the decree embodied the agreement of the parties no more limited the power of the court than if it had been a contested decree.

There can be no dispute that the basic purpose of the instant decree was divorcement. The preamble to the decree explicitly declares: "The RKO defendants hav[e] represented to the plaintiff and to [the] Court that they propose to put into effect * * * a plan of reorganization which will have as its object and effect the divorcement of RKO's production-distribution assets from RKO's theatre assets" (R. 171). To realize that purpose, it was necessary that the controlling stockholder in the old corporation become a party to the settlement and agree to dispose of his interest in one of the two new companies contemplated by the decree.[13] Obviously, if appellant is permitted to retain ownership in the theatre company and ownership and control in the picture company, the basic purpose cannot be achieved. See p. 16, *supra*. This in itself would justify modification of the decree, once appellant's unwillingness promptly to sell the stock became apparent.

[13] Appellant was not a defendant in the original proceedings, for the simple reason that he acquired his holdings subsequent to the commencement of the litigation. Of course, if he had refused to become a party to the consent decree, the Government could have taken steps, in prosecuting the litigation further, to join him as a party defendant, or to secure by other means a prohibition against common stockholding.

Appellant argues, however, that the Government has not shown any fact or circumstance justifying a change in the decree (Br., p. 8), and points to the fact that no evidentiary hearing was conducted below (*id.*, p. 5). But an evidentiary showing is not necessary when the object of the modification sought is to overcome an interpretation of the decree by appellant incompatible with the original basic purpose.

If changed circumstances must be shown in a case such as this, that requisite has been supplied by appellant's course of conduct since the entry of the decree.[14] It was well known to the district court that appellant and RKO had sought numerous extensions and modifications between the time of entry of the decree and the date appellee brought on its motion to establish a time limit for final disposition of the stock (Statement, *supra*, pp. 7–9). Beyond that, appellant's position in opposing the motion, and his position before this Court, is that he need not take a single step to "dispose of his holdings in either of the new companies" (Br., p. 8). That position, characterized by Judge Hand as "most extreme"

[14] It is also significant that the District Court subsequent to the entry of the decree in this case imposed similar conditions of divorcement in the contested decrees entered with respect to other defendants in the original *Paramount* case. It is apparent that appellant and RKO could not, by withholding their consent, have avoided an effective decree of divorcement which would have prevented anyone from having a substantial interest in both production and exhibition.

(R. 252), was certainly not anticipated at the time of entry of the consent decree, and it is one which we believe utterly incompatible with the scheme of that decree. Since appellant conceded in open court that it was his position that "he does not have to do anything ever" (R. 252), it would have been utterly futile to hear further evidence going to the question of appellant's willingness to make final disposition of the stock with reasonable promptitude. There could be no more eloquent testimony of a determination to frustrate the basic purpose of the decree.

As is frequently the case in major antitrust suits which terminate in the formulation of provisions for relief, the judgment here is one of considerable complexity. Running to nineteen printed pages (R. 170–188), it provides, among other things, for trade practice relief, divorcement, and divestiture. Express reservation of power to modify the judgment, as is customary in judgments of this kind, is a recognition of the fact that it is scarcely possible to foresee all contingencies or to resolve in advance all matters which may require court determination. This power to modify in order "to effectuate * * * the basic purpose of the * * * decree" (*Chrysler Corporation* v. *United States*, 316 U. S. 556, 562) is certainly adequate to prevent appellant here from postponing *ad infinitum* the event which will terminate the court-created trust and which

alone will make the divorcement, to which the parties subscribed in principle, a true and effective divorcement.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

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